TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 425.

THE NATIONAL SURETY COMPANY, PLAINTIFF IN ERROR,

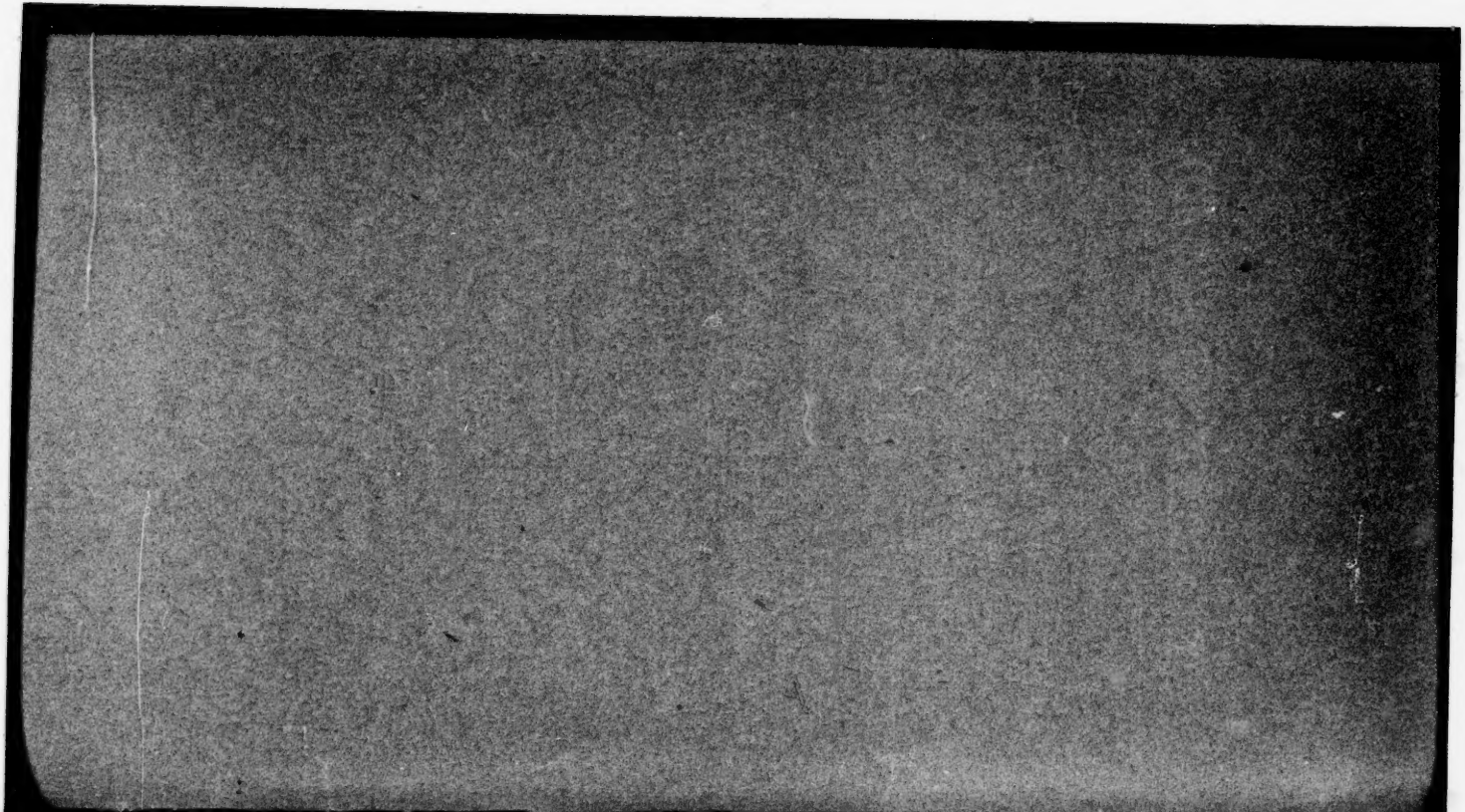
vs.

THE ARCHITECTURAL DECORATING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 11, 1911.

(22,855)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1912.

1 STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENDRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Certified Return to Supreme Court.

Filed May 16, 19911.

I. A. CASWELL, *Clerk.*

2 STATE OF MINNESOTA,
County of St. Louis, ss:

I hereby certify and return, that at Duluth, the County and State aforesaid, on the 22nd day of March A. D. 1910, I served the summons hereto attached upon the within named Henry C. Hendricksen personally, by handing to and leaving with him a true and correct copy thereof.

Dated this 23rd day of March, 1910.

WM. J. BATES,
Sheriff St. Louis County, Minn.,
By C. E. JOHNSON,
Deputy Sheriff.

Sheriff's fees, Service.... $1.00
Travel $1.00

STATE OF MINNESOTA,
County of Ramsey, ss:

I hereby certify and return, that at the City of St. Paul, County and State aforesaid, on the 17th day of March, A. D. 1910, I served the summons hereby attached upon the within named National Surety Company personally, by handing to and leaving with W. S. McCurdy, Vice Pres. of said National Surety Company a true and correct copy thereof.

Dated this 17th day of March, 1910.

WILLIAM A. GERBER,
Sheriff, St. Louis County, Minn.,
By FRED TURNER, *Deputy.*

Copy.

Sheriff's fee, Service.... $1.00
Travel ..... .20

$1.20

3 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENDRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Summons.

The State of Minnesota to the Above Named Defendants:

You and each of you are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which has been filed in the office of the Clerk of said District Court, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in Room 800 Lonsdale Building, in Duluth, in said County, within twenty (20) days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you and each of you for the sum of One thousand thirty-four and 95/100 Dollars ($1,034.95), with interest thereon from August 16th, 1909, at the rate of six per cent per annum, together with his costs and disbursements herein.

A. L. AGATIN,
Attorney for Plaintiff, Duluth, Minnesota.

Office Address: 800 Lonsdale Building.
Residence: 2402 East 5th Street.
Dated March 15th, 1910.

Received Mar. 17, 1910.
WM. A. GERBER, *Sheriff,*
By W. W. KRAES, *Deputy.*

Received Mar. 22, 1910.
WM. J. BATES, *Sheriff,*
By S. L. PIERCE, *Deputy.*

Filed in my office Feb. 28, 1911.
J. P. JOHNSON, *Clk Dist. Court,*
By J. S. MOODY, *Deputy.*

4 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

ARCHITECTURAL DECORATING COMPANY, Plaintiff-Respondent,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY, Defendants; NATIONAL SURETY COMPANY, Defendant-Appellant.

Complaint.

For a cause of action against the above named defendants, the plaintiff above named alleges and shows:

I.

That it now is and during all the times hereinafter mentioned always has been a corporation duly organized and existing under the laws of the State of Illinois, and that the defendant, National Surety Company, now is and during all of said times has been
5 a corporation oragnized under the laws of the State of New York.

II.

That on or about the 8th day of October, 1908, the defendant, Henry C. Henricksen, made and entered into a contract or agreement with the School District No. 39 St. Louis County, Minnesota, by the terms of which he, among other things, agreed to provide all the materials and perform all the work for the erection and completion of a certain public building, to-wit, a brick High School Building at Eveleth, Minnesota, according to the plans and specifications prepared by Bray & Nystrom, for the agreed price of fifty-eight thousand and three hundred dollars ($58,300.00), which said contract is more fully hereinafter referred to.

That said School District No. 39 St. Louis County Minnesota, is a public corporation organized under the laws of the State of Minnesota, for public school purposes, as a common school district.

III.

That the contract aforesaid was for a public High School building, and for the purpose of enabling said defendant Henricksen to carry out said contract and to give the same validity under the laws of the state in such case made and provided, the defendants above named, said Henricksen as principal and the National Surety Company as surety, on or about the 17th day of October, 1908, made, executed and delivered to the said School District No. 39 St. Louis County, Minnesota, for the use of said School District and of all other persons doing work or furnishing skill, tools, ma-
6 chinery or materials under, or for the purpose of, such contract, a certain bond, a true and correct copy whereof is marked Exhibit "A," hereto attached and made a part of this allegation, with the same force and effect as if said bond was expressly

incorporated herein. That thereupon such bond was duly accepted by said School District and was approved by and filed with the treasurer of said School District. That the contract referred to and attached to said bond is the same contract as the one referred to in paragraph II hereof.

IV.

That thereafter and between the 16th day of July, 1909, and the 16th day of August, 1909, both dates inclusive, the plaintiff above named, at the special instance and request of the defendant Henricksen, and for the purpose of enabling said Henricksen to carry out the contract aforesaid of said School District, furnished certain labor and material consisting of ornamental plaster work for the Eveleth High School building referred to in said contract, in accordance with the plans and specifications prepared by the architects in said contract mentioned, all of which labor and material was so furnished and erected in place in the said Eveleth High School building in accordance with said plans and specifications, and all of which was actually used in the erection of said building, for all of which said Henricksen agreed to pay to the plaintiff the sum of one thousand fifty dollars ($1,050.00), which said sum was then and there the reasonable and fair value of the said labor and material so furnished as aforesaid, and that all of the same was used therein under said contract between said Henricksen and the said School District.

7

V.

That no part of said claim has ever been paid except the sum of fifteen and 5/100 dollars ($15.05), and that there is justly due to said plaintiff for the labor and material aforesaid the sum of one thousand thirty-four and 95/100 dollars ($1,034.95), with interest from August 16th, 1909, which said sum is long past due, although payment thereof has been duly demanded.

VI.

On information and belief plaintiff alleges that said Henricksen has not yet fully completed the contract aforesaid and that the High School building aforesaid has not been accepted by the School District aforesaid; and that on the 8th day of March, 1910, the plaintiff caused a written notice to be served upon the defendant, National Surety Company, specifying the nature and amount of plaintiff's claim and the date of furnishing the last item thereof; and that on the 11th day of March, 1910, plaintiff caused to be served on the said defendant Henricksen a like notice as the one served on the National Surety Company, a copy of which said notice is marked Exhibit "B," attached hereto and made a part hereof.

VII.

That the said Henricksen did not pay the plaintiff for its said labor and material furnished aforesaid for the completion of said contract, and that by reason of the facts aforesaid, the condition of

said bond has been broken to the damage of plaintiff in the aforesaid sum of one thousand thirty-four and 95/100 dollars ($1,034.95).

8 Wherefore, plaintiff demands judgment against said defendants, and each of them, for the sum of one thousand thirty-four and 95/100 dollars ($1,034.95), with interest thereon from August 16th, 1909, at the rate of six per cent per annum, and for his costs and disbursements herein.

Dated March 14th, 1910.

A. L. AGATIN,
Attorney for Plaintiff,
No. 800 Lonsdale Building, Duluth, Minnesota.

STATE OF MINNESOTA,
County of St. Louis, ss:

A. L. Agatin, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing complaint and that the same is true to the best of his knowledge, information and belief, and that the reason why this verification is not made by one of the officers of the plaintiff, is that they are all absent from the said County of St. Louis, State of Minnesota, wherein this affiant resides.

A. L. AGATIN.

Subscribed and sworn to before me this 15th day of March, 1910.

LEON E. LUM,
Notary Public, St. Louis County Minnesota.

My commission expires April 6th, 1911
(Notarial Seal, St. Louis Co., Minn.)

9 EXHIBIT "A."

Know all men by these presents, That Henry C. Henricksen as principal and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized and licensed to do business in the State of Minnesota, as surety, are held and firmly bound unto School District Number Thirty-nine, St. Louis County, Minnesota, in the sum of fifty-eight thousand and three hundred ($58,300.00), lawful money of the United States, to the full and prompt payment of which we jointly and severally bind ourselves and each of our successors, heirs, administrators and assigns firmly by these presents.

The condition of this obligation is such that, whereas the above bounden Henry C. Henricksen, on the eighth day of October, 1908, entered into a written contract with the said School District No. 39, St. Louis County, Minnesota, a copy of which contract (except the signatures of the parties thereto) is hereto attached and made a part of this bond the same as if the terms of said contract were incorporated herein in full.

Now Therefore, if the said Henry C. Henricksen shall pay as they become due, all just claims for work, tools, machinery, skill and materials, furnished for the completion of said contract and shall complete said contract in accordance with its terms, and shall save the said School District harmless from all costs and charges that may accrue on account of the doing of the work specified in said contract and shall comply with all of the laws appertaining thereto, then this obligation shall be void but otherwise of full force and effect. This bond is for the use of said School District and of all persons doing work or furnishing skill, tools, machinery or materials under, or for the purpose of, such contract.

In Witness Whereof, the said principal herein has hereunto set his hand and seal and said surety has hereunto caused its corporation name and seal to be duly affixed this 17th day of October, 1908.

(Signed) HENRY C. HENRICKSEN. [SEAL.]
NATIONAL SURETY COMPANY,
(Signed) By L. B. MANLEY, *Its Attorney in Fact.*

Attest: —— ——.

Signed, Sealed and Delivered in Presence of

(Signed) W. G. BONHAM,
(Signed) GEO. L. WOOLLEN,
As to Henry C. Henricksen.
(Signed) H. R. WILSON,
(Signed) WALTER G. AMUNDSON,
As to National Surety Company.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 17th day of October, 1908, personally came before me Henry C. Henricksen to me known to be the person described in and who executed the foregoing bond and he acknowledged that he executed the same as his free act and deed.

(Signed) W. G. BONHAM,
Notary Public, St. Louis Co., Minn.

My commission expires May 14, 1914.

STATE OF NEW YORK,
County and City of New York, ss:

On this 22nd day of October, 1908, personally came before me L. B. Manley, to me personally known, who being by me first duly sworn, did say that he is the Attorney in Fact of the within named corporation National Surety Company, that the corporate seal attached is the corporate seal of said corporation and that the within instrument was signed, sealed and executed by authority of the board of directors of said corporation and both acknowledged the within

instrument and the execution thereof to be the free act and deed of said corporation.

(Signed) WALTER G. AMUUNDSON,
Notary Public, St. Louis Co., Minn.

My commission expires Sept. 26, 1914.

This agreement, Made the eighth day of October in the year one thousand nine hundred and eight by and between Henry C. Henricksen, of Duluth, Minn., party of the first part (hereinafter designated the Contractor), and School District No. thirty-nine St. Louis County, Minnesota, party of the second part (hereinafter designated the Owner), Witnesseth:

That the Contractor, in consideration of the agreement herein made by the Owner, agrees with the said Owner as follows:

Article I. The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a brick high school building at Eveleth, Minn., as shown on the drawings and described in the specifications prepared by Bray & Nystrom, Architects, which drawings and specifications become hereby
12 a part of this contract, and have been identified on each sheet thereof by initials of Contractor and Owner.

Article II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decisions as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Article I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architects are and remain their property, and that all charges for the use of the same, and for the services of said Architects are to be paid by the said Owner.

Article III. No alterations shall be made in the work except upon order of the Architects or Owner, the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be agreed upon. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in cases of failure to agree, the determination of said amount shall be referred to arbitration, as provided
13 for in Article XII. of this contract.

Article IV. The Contractor shall provide sufficient, safe, and proper facilities at all times for the inspection of the work by the Architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them whether worked or unworked, and

to take down all portions of the work which the Architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Article V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after two days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this con-
14 tract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials thereof; and in case of such discontinuance of the employment *of* the Contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damages incurred through such default, shall be audited and certified by the Architects, whose certificate thereof shall be conclusive upon the parties.

Article VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this agreement by on or before August 15th, 1909.

Article VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architects, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire, or other casualty for which the Contractor is not responsible, or by strikes or lockouts caused by acts of employés, without fault of Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of
15 any or all the causes aforesaid, which extended period shall be determined and fixed by the Architects; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within forty-eight hours of the occurrence of such delay.

Article VIII. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this

contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that if he shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then he shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Article XII. of this contract.

Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be fifty-eight thousand and three hundred dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architects, as follows:

The Architects will issue certificates, in periods of not less than fifteen days. Such certificates will be in amounts in their judgment equal to eighty-five per cent of the value of work and materials incorporated in the building, at the time certificate is issued, less amounts previously paid on amount of this contract.

16 Upon the final completion of the work contemplated in this contract, and the acceptance of the same by the Architects, a certificate for all money due under this contract will be issued to the Contractors and the final payment shall be made within thirty days after the completion of the work included in this contract, and all other payments shall be due when certificates for the same are issued.

Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, shall be evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article XI. The Owner shall during the process of the work maintain insurance on said work, in its own name and in the name of the Contractor, against loss or damage by fire. The policies to cover all work incorporated in the building, and shall be made payable to the parties hereto, as their interest may appear. The amount of insurance shall be fixed from time to time by the Architects as agents of both Contractor and Owner.

Article XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Articles III. or VII. of this contract, or should either of them dissent from the decision of the Architects referred to in Article VII. of this contract, which dissent shall have been filed in writing with the Architects within ten days of the announcement of such decision,

17 then the matter shall be referred to a Board of Arbitration, consisting of three members, one in behalf of the Owner, and one in the behalf of the Contractor, those two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. In event of the death or inability to serve of the party named in behalf of the Owner, then the Owner shall select a

person in his place; in event of the death or inability to serve of the party named in behalf of the Contractor, then the Contractor shall select a person in his place; in event of the death or inability to serve of the third party, then the remaining arbitrators shall choose a person in his place. Each party hereto shall pay one-half of the expense of such reference.

Article XIII. The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

Should the Owner decide to substitute terra cotta for cut stone above the base courses, the Contractor agrees to deduct the difference between the cost price (on the ground) of cut stone and terra cotta, from the contract price, provided terra cotta costs less than cut stone. Any brick, stone or other material in the building, owned by the Owner, recently destroyed by fire, shall be at the disposal of the Contractor, free of cost, and may be used in this building, with the approval of the Architects.

In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In presence of

——— ———.

18 EXHIBIT "B."

To National Surety Company, a corporation under the laws of the State of New York, and Henry C. Henricksen:

Notice.

You will please take notice that the Architectural Decorating Company, a corporation with its principal place of business at Chicago, Illinois, has furnished certain labor and material consisting of ornamental plaster work for the Eveleth High School Building located at Eveleth, Minnesota, in accordance with plans, drawings and specifications prepared by Bray & Nystrom, architects for the School District Number 39, all of which labor and material was so furnished and erected in place in the said Eveleth High School Building in accordance with said plans, drawings and specifications at the special instance and request of Henry C. Henricksen, the contractor for said building, all of which said labor and material was actually used in the erection of said building, for all of which said Henry C. Henricksen agreed to pay to the said Architectural Decorating Company the sum of $1050.00, which said sum was then and there the reasonable and fair value of the said labor and material so furnished as aforesaid.

That at and before the time of the furnishing of said labor and material the said Henry C. Henricksen had a contract with the School District Number 39, St. Louis County, Minnesota, bearing date October 8th, 1908, for the erection and completion of said High School Building at Eveleth and the furnishing of all the ma-

19 terials and performing all of the work therein in accordance with the drawing and specifications prepared by the

Architects aforesaid, and that said labor and material furnished by the aforesaid Architectural Decorating Company was furnished to said Henricksen for said building and used therein under said contract between said Henricksen and the said School District aforesaid.

That no part of said claim has ever been paid except the sum of $15.05 and that there is justly due to said Architectural Decorating Company for said material and labor aforesaid the sum of $1034.95, with interest thereon from August 16th, 1909, which said sum is long past due although payment thereof has been duly demanded, and that the date of the furnishing of the last item by this claimant of this labor and material was August 16th, 1909, and that the aforesaid High School Building has not yet been accepted by the proper public authorities.

That the National Surety Company above named has duly made and delivered to the aforesaid School District its certain bond, wherein said Henry C. Henricksen was the principal and the said Surety Company the surety for the use of said School District and of all persons doing work or furnishing materials, including the claimant, under or for the purpose of such contract, conditioned for the payment as they become due of all just claims for such work and material for the completion of the contract aforesaid, as provided by the law of the State of Minnesota, and this notice is given to you and each of you pursuant to the requirements of the law of Minnesota in such case made and provided.

Dated March 1st, 1910.

ARCHITECTURAL DECORATING COMPANY,

(Signed) By A. L. AGATIN,
Attorney for said Company, No. 800 Lonsdale Building, Duluth, Minnesota.

Filed in my office Mar. 16, 1910.

J. P. JOHNSON, *Clk Dist. Court.*
By G. A. HARRINGTON, *Deputy.*

20 STATE OF MINNESOTA,
County of St. Louis, ss.:

E. C. Carman, being first duly sworn, according to law, deposes and says:—

1. That at Duluth, in St. Louis County, Minnesota, on the first day of April, 1910, he served the hereto attached demurrer in the case of Architectural Decorating Company vs. Henry C. Henricksen and National Surety Company upon A. L. Agatin, the attorney of record for the plaintiff, by handing to and leaving with Letitia Blais, an adult person in charge of the office of said A. L. Agatin, a true and correct copy of said demurrer.

2. That said A. L. Agatin was not in his office at the time said service was made.

E. C. CARMAN.

Subscribed and sworn to before me this 1st day of April, 1910.

[NOTARIAL SEAL.]

JOHN T. PEARSON,
Notary Public, St. Louis County, Minnesota.

My commission expires Jan'y 1st, 1915.

21 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY, Defendants.

Demurrer.

Defendant National Surety Company above named demurs to the complaint of the plaintiff in the above entitled action, upon the grounds and for the reasons that said complaint does not state facts sufficient to constitute a cause of action as against said National Surety Company.

Dated this 31st day of March, 1910.

WASHBURN, BAILEY & MITCHELL,
Lonsdale Building, Duluth, Minn., and
BALDWIN, BALDWIN & DANCER,
First Nat. Bank Bldg., Duluth, Minn., Attorneys for Defendant National Surety Company.

Filed in my office Apr. 23, 1910.
J. P. JOHNSON, *Clk Dist. Court,*
By J. S. MOODY, *Deputy.*

22 STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY, Defendants.

Order Overruling Demurrer to Plaintiff's Complaint.

The defendant National Surety Company having interposed a demurrer to the plaintiff's complaint herein, on the ground that said complaint does not state facts sufficient to constitute a cause of ac-

tion, the same came on for argument before the Court, Messrs. Baldwin, Baldwin & Dancer appearing for said defendant in support of such demurrer, and Mr. A. L. Agatin appearing for the plaintiff in opposition thereto. The Court having heard the arguments of counsel and being now fully advised in the premises,

It is ordered, that said demurrer be and the same hereby is overruled.

It is further ordered, That said defendant have ten days after service of notice hereof within which to make and serve its answer, if it shall be so advised.

Dated December 16, 1910.

By the Court:

WM. A. CANT, *Judge.*

Memorandum.

At the time the bond which is here in question was given, Section 4539 Revised Laws 1905 was in force and applied thereto. Before steps to enforce the obligation of the bond became necessary that section of the statute had been amended by Chapter 413 of the Laws of 1909, which made no exception as to bonds executed before the passage thereof. In proceedings to enforce the obligation of the bond plaintiff complied with the provision of said Chapter 413 but did not comply with said Section 4539.

The question to be determined is whether such compliance with said Chapter 413 was sufficient. This involves the consideration and determination of the question as to whether, assuming said
23 Chapter 413 to apply to bonds executed and delivered prior to its passage, it is a violation of the constitutional provision both of the United States and of this State against impairing the obligation of contracts. (U. S. Const. Art. 1 Sec. 10; Const. of Minn., Art. 1, Sec. 11.)

It is impairment of the obligation of contracts which is prohibited. A change in the remedial rights with respect thereto, when such change does not substantially affect the obligation, is everywhere permitted. This requires no discussion. Was Section 4539 (supra) so connected with the bond in question as to be a part or affect the obligation thereof within the meaning of the law, or did it merely concern the remedial rights of those who may be or become interested therein?

This question must be determined somewhat arbitrarily perhaps according to our understanding of language. In saying that, we are as far back into the question as we can go. Assistance may be had from cases construing other statutes and from observations there recorded. In my opinion the obligation of the contract here involved exists and is fully formed without reference to the statute. It may be contemplated, (1) as existing and as recognized and fully performed without any appeal being made to the statute at all; or (2) as existing and as either recognized or not, but wholly unperformed and with no steps taken to enforce the same; and (3) as existing and with all the legal steps taken which are necessary to en-

forcement thereof. The obligation of the contract, as we understand that term, would be as complete in one of these cases as in the other. The obligation of the contract was to pay not exceeding a certain amount.

24 In discussing the statute we almost unconsciously speak of it as prescribing the methods for the enforcement of the contract; and we consciously approve of the construction and meaning so given. The statute as amended neither increases the liability of the obligator nor advances the time of payment. It may postpone the time of payment. Under the earlier statute, a preliminary step to the enforcement of the obligation was the giving of a certain notice within ninety days after furnishing the last item of material. Another preliminary step was the beginning of an action (the service of a summons, another notice) within one year after the cause of action accrued. It is said that the first notice was in the nature of a warning, and if given would enable the obligator to take steps for its own protection and that, therefore, the provision therefor must be a part of the contract. No one seems to contend seriously that the provision prescribing the time within which the action must be brought, the service of the second notice, may not be changed or that it is a part of the contract. It seems admitted that such change would affect the remedy only. The contention is alone with respect to the ninety-day notice. If no such notice was prescribed and the provision for beginning the action within one year alone remained, the summons in such action would serve the double purpose now covered by both the notice and the summons. It would then be the only notice and warning required to be given, just as it is now the second notice or warning. But no one even then would assert that the time within which a summons or notice should be served might not be changed by statute. On careful analysis no satisfactory reason appears for calling

25 one of these notices a warning more than the other, or for concluding that one is a part of the contract while the other is not. They are both in the same class.

The distinction attempted to be made in favor of the ninety day notice is, in my opinion, unsound. It is no more a part of the contract than is the provision or limitation as to the time within which the action must be begun. It is no more a part of the contract than would be the provision or limitation as to the time of beginning the action, if that limitation only was found in the statute. It is a step preliminary to the enforcement of the obligation of the contract just as is the service of the summons. Statutory provisions which happen to be important and favorable in their operation to a certain individual or to a certain class are not for that reason protected by the constitution against change. The right to claim that at the end of a certain period an action will be barred, the right on the part of an endorser of commercial paper to notice of non-payment within a certain time, and the right on the part of property holders or lien claimants to have certain steps taken in a certain order and within a certain time in the foreclosure of mechanics' liens are all important, but they are all subject to change at the legisla-

tive will. They do not impair the obligation of contracts. All men do business with the understanding that such changes may be made. They might have been made either in favor of or against the plaintiff in this case and either in favor of or against the defendant. The change here involved, from the old statute to the new, was of this class.

Cases affecting the rights of creditors, where it has been
26 held that a change in the remedy impaired the obligation of a contract are not in point. This is not because the rights of debtors are less regarded than the rights of creditors. It is because it will be found in all well considered cases where such holdings have been made that the change in the remedy did in fact impair the obligation of the contract. Of course, to take an extreme case, a remedy may be so changed that compliance therewith is impracticable or impossible. That in effect destroys the contract altogether as an asset of the obligee, and such a change of remedy is within the constitutional inhibition.

If the foregoing views are correct, the statutes referred to relate to the remedy only. The amendment, even though applied to contracts entered into prior to this enactment, violated no constitutional provision, and compliance with an amendment should be had in the enforcement of contracts to which it applies. The demurrer should, therefore, be overruled.

Filed in my office Dec. 17, 1910.

J. P. JOHNSON,
Clk Dist. Court,
By R. E. JOHNSON, *Deputy.*

27 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Separate Answer of Defendant National Surety Company.

National Surety Company, one of the defendants above named, for its separate answer to the complaint of the plaintiff in the above entitled action:

1. Denies each and every allegation in said complaint except as hereinafter expressly admitted.

2. Admits the allegations contained in paragraphs I, II, and III of said complaint.

28 3. Admits that plaintiff performed certain labor and furnished certain material, consisting of ornamental plaster work, to said Henricksen for said building; but denies knowledge

or information sufficient to form a belief as to the value or agreed price of the labor or material so furnished.

4. Upon information and belief alleges that said Henricksen, prior to the commencement of this action, had paid to plaintiff a part of the value and purchase price of said labor and material; but denies knowledge or information sufficient to form a belief as to the amount thereof so paid or as to the amount remaining due, if any, for said labor and material so furnished by plaintiff.

5. Alleges that at the time said contract was entered into between said Henricksen and said school district, and at the time said bond was executed and delivered to said school district as aforesaid, the statutes of the State of Minnesota, under which said bond was given, being Section 4535 of the Revised Laws of Minnesota, for the year 1905, read as follows:

"4535. Bonds of Public Contractors—Penalty.—No contract with the state or with any municipal corporation or other public board or body thereof, for the doing of any public work, shall be valid for any purpose, unless the contractor shall give bond to the state or other body contracted with, for the use of the obligee, and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payments, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee
29 harmless from all costs and charges that may accrue on account of the doing of the work specified, and for compliance with the laws appertaining thereto. The penalty of such bond shall be not less than the contract price."

That at the same time, Section 4539 of the Revised Laws of the State of Minnesota for the year 1905, having reference to such bond, read as follows:

"4539. Limit of Time to Bring Action.—No action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

6. Alleges that plaintiff did not, within ninety days after performing the last item of work and furnishing the last item of skill, tools, machinery or material for said building, serve upon said Henricksen or this defendant a notice specifying the nature of his claim or the date of furnishing the last item thereof, or any notice whatever.

7. Admits that on the 11th day of March, 1910, plaintiff served upon the defendant Henricksen a notice, of which Exhibit B, attached to plaintiff's complaint, is a copy; and upon information and belief this defendant alleges that none of the labor or material furnished by plaintiff, as alleged in his complaint or otherwise, was furnished subsequent to the 16th day of August, 1909.

For a further answer to plaintiff's complaint herein, this defendand alleges:

30 8. That plaintiff is and at all times mentioned in said complaint was a corporation organized for pecuniary profit under the laws of the State of Illinois; that at all times mentioned in the complaint and in this answer, plaintiff was carrying on business in the County of St. Louis and State of Minnesota for pecuniary profit, and all of the transactions had between plaintiff and defendant Henricksen referred to in the complaint herein and in this answer were had and transacted in said County of St. Louis and State of Minnesota for pecuniary profit, and was at all times and is a corporattion for pecuniary profit, within the meaning of the laws hereinafter referred to.

9. That plaintiff has never at any time appointed an agent residing in the State of Minnesota, authorized to accept service of process or upon whom service of process may be had in any action in which plaintiff might be a party, and has never filed or caused to be filed in the office of the Secretary of State of the State of Minnesota a copy of the appointment of any such agent.

10. That plaintiff has never filed or caused to be filed with the Secretary of State of the State of Minnesota a copy of its charter or certificate or articles of incorporation, authenticated or otherwise, nor a statement sworn to or otherwise, showing the proportion of the capital stock of the plaintiff which is represented by its property located and business transacted in the State of Minnesota, and has never paid into the state treasury of the State of Minnesota any sum of money for any purpose whatever; and the Secretary of State of the State of Minnesota has never issued to plaintiff a certificate that plaintiff has complied with the laws of this

31 State, or is authorized to do business in this State, or any certificate stating the amount of plaintiff's capital stock or the proportion thereof which is represented in this State, and plaintiff has never complied or attempted to comply with any of the requirements of Chapter 69 or Chapter 70 of the General Laws of Minnesota for the year 1899, or with any of the provisions of Section 2888 or Section 2889 of the Revised Laws of Minnesota of 1905.

11. That plaintiff is not and never has been a corporation exempted from the terms of said laws and is not a corporation included within any of the exceptions referred to in said laws; that plaintiff has not at any time been engaged in an exclusively manufacturing business in this State, and has not solicited its business through drummers or traveling salesmen in this State, and has not been wholly in the business of loaning money or investing in securities in this State, and has not been and is not organized for the purpose of raising or improving live-stock, cultivating or improving farm or garden or horticultural lands, nor for growing sugar beets or for canning fruit or vegetables, and has not paid to the state treasurer of the State of Minnesota the fees on capital stock required of domestic corporations under Chapter 225 of the General Laws of Minnesota for the year 1889, and is not and has

not been a corporation whose sole business in this State is the transportation of freight or passengers or both by water.

12. That plaintiff, because of the foregoing facts, has never been authorized to transact business in the State of Minnesota, or to begin or maintain this action in the courts of this State.

32 13. That plaintiff did not, before the service of the summons in this action, or at any time, file any bond in the office of the clerk of this court to secure the payment of costs and disbursements herein, as provided by law or otherwise.

Wherefore, this defendant demands that it be hence dismissed with its proper costs.

WASHBURN, BAILEY & MITCHELL,
Alworth Building, Duluth, Minnesota, and
BALDWIN, BALDWIN & DANCER,
301-306 *First National Bank Building, Duluth, Minnesota, Attorneys for Defendant National Surety Company.*

STATE OF MINNESOTA,
County of St. Louis, ss:

C. O. Baldwin, being duly sworn, deposes and says:

That he is one of the attorneys for National Surety Company, one of the defendants above named; that the foregoing answer is true to the best of his knowledge and belief; and that there is no officer of said defendant in the County of St. Louis, where lives this affiant, acquainted with the facts and capable of verifying this answer.

C. O. BALDWIN.

Subscribed and sworn to before me this 17th day of January, 1911.

[Notarial Seal, St. Louis Co., Minn.]

E. C. CARMAN,
Notary Public, St. Louis County, Minnesota.

My commission expires May 20, 1917.

Due service of the within answer by copy is hereby admitted at Duluth, Minn., this 19th day of January, 1911, under stipulation of even date herewith.

A. L. AGATIN,
Attorney for Plaintiff.

Filed in my office at — o'clock — M. Apr. 27 1911.

J. P. JOHNSON,
Clk Dist. Court.
By R. E. JOHNSON, *Deputy.*

33 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Amount Claimed in Summons.

Principal ..... $
Interest ..... $

Plaintiff's Costs and Disbursements.

Statutory Costs ..... $
Affidavits ..... $
Sheriff's fees ..... $
Clerk's fees (to be added) ..... $

The above bill of Costs and Disbursements taxed and allowed at $—.
Dated —— 189–.

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

STATE OF MINNESOTA,
County of St. Louis, ss:

A. L. Agatin being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action; that the summons and complaint in said action were duly served upon the defendant, H. C. Henricksen, on the 22nd day of March, 1910, as appears by the return thereon; that more than twenty days have elapsed since the service of said summons and that no answer or demurrer, or copy of either, has been received by the plaintiff's attorney in this cause, nor has said defendant-, or either of them, in any manner appeared therein, by attorney or otherwise, and plaintiff prays judgment according to law.

A. L. AGATIN.

Subscribed and sworn to before me, this 28th day of February, 1911.

HANS B. HAROLDSON,
[SEAL.] *Notary Public, St. Louis County, Minn.*

My Commission expires March 7th, 1912.

Filed in my office Feb. 28 1911.
J. P. JOHNSON, *Clk Dist. Court,*
By R. E. JOHNSON, *Deputy.*

34 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Reply.

Now comes the plaintiff above named and for a reply to the new matter set up in the separate answer of defendant National Surety Company, denies each and every allegation of such new matter in said answer contained, except in so far as the same admits any of the allegations of the complaint.

Wherefore, Plaintiff asks judgment as demanded in the complaint.

Dated February 6th, 1911.

A. L. AGATIN,
Attorney for Plaintiff, No. 1107 Alworth Building, Duluth, Minnesota.

STATE OF MINNESOTA,
County of St. Louis, ss:

A. L. Agatin, being duly sworn, says:

That he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing reply and that the same is true to the best of his knowledge, information and belief, and that the reason he makes this affidavit is because all of the officers of the plaintiff are absent from the County of St. Louis, wherein deponent resides.

A. L. AGATIN.

Subscribed and sworn to before me on this 6th day of February, A. D. 1911.

[Notarial Seal, St. Louis Co., Minn.]

C. C. COLTON,
Notary Public, St. Louis County, Minnesota.

My commission expires Nov. 1, 1914.

Service admitted the 6th day of February, 1911.

BALDWIN, BALDWIN & DANCER,
WASHBURN, BAILEY & MITCHELL,
Att'ys for Def't Nat. Surety Co.

Filed in my office Feb. 28 1911.

J. P. JOHNSON, *Clk Dist. Court,*
By J. S. MOODY, *Deputy.*

35 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Findings and Order for Judgment.

The above entitled action came on for trial at the General January 1911 term, before the court, without a jury, (jury trial being waived by stipulation of the parties), A. L. Agatin appearing for the plaintiff, Baldwin, Baldwin & Dancer and Washburn, Bailey & Mitchell appearing for defendant National Surety Company, and no one appearing for defendant Henricksen, and it duly appearing that said defendant Henry C. Henricksen was duly ad personally served with summons, made no answer thereto and is wholly in default for want of an answer or other appearance in person or by attorney, and the court having heard the testimony adduced by the respective parties, and having considered the same, together with the admissions made in open court upon said trial and the pleadings herein, and being fully advised in the premises, now makes the following

Findings of Fact.

1. That during all the times hereinafter mentioned the plaintiff has been and now is a corporation duly organized and existing under the laws of the State of Illinois, and that the defendant National Surety Company now is and during all of said times has been a corporation organized under the laws of the State of New York.

2. That on or about the 8th day of October, 1908, the defendant Henry C. Henricksen, made and entered into a contract or agreement with the School District No. 39, St. Louis County, Minnesota, by the terms of which he, among other things, agreed to provide all the materials and perform all the work for the erec-
36 tion and completion of a certain public building, to-wit a brick High School building at Eveleth, Minnesota, according to the plans and specifications prepared by Bray & Nystrom, for

the agreed price of fifty-eight thousand and three hundred dollars ($58,300.00), which said contract is more fully hereinafter referred to. That said School District No. 39, St. Louis County, Minnesota, is a public corporation organized under the laws of the State of Minnesota, for public school purposes, as a common school district.

3. That the contract aforesaid was for a public High School building, and for the purpose of enabling said defendant Henricksen to carry out said contract and to give the same validity under the laws of the State in such case made and provided, the defendants above named, said Henricksen as principal, and the National Surety Company as surety, on or about the 17th day of October, 1908, made, executed and delivered to the said School District No. 39 St. Louis County, Minnesota, for the use of said School District and of all other persons doing work or furnishing skill, tools, machinery or materials under, or for the purpose of, such contract, a certain bond, a true and correct copy whereof is marked Exhibit "A" and attached to plaintiff's complaint and is made a part of this finding. That thereupon such bond was duly accepted by said School District and was approved by and filed with the Treasurer of said School District. That the contract referred to and attached to said bond is the same contract as the one referred to in Finding No. 2 hereof.

4. That thereafter and prior to the 16th day of July, 1909,
37 at Chicago, Illinois, said plaintiff sold to the defendant Henricksen, certain ornamental plaster work to be used in and for the said Eveleth High School building, and agreed to perform the necessary labor to put the same in place in accordance with the plans and specifications of said buliding prepared by the architects in said contract referred to, for the agreed price of one thousand and fifty dollars ($1,050.00), which was then and there the reasonable and fair value of the said material and labor necessary to put the same in place, and that thereafter and between the 16th day of July, 1909, and the 16th day of August, 1909, both dates inclusive, the plaintiff above named, pursuant to said agreement, and to enable said Henricksen to carry out the contract aforesaid of said School District, furnished said labor and material consisting of said ornamental plaster work for the Eveleth High School building referred to in said contract, in accordance with such plans and specifications, all of which was so furnished and put in place in the said Eveleth High School building in accordance with said plans and specifications, and all of which was actually used in the erection of said building, and that all of the same was used therein under said contract between said Henricksen and the said School District, and was of the fair and reasonable value of one thousand fifty dollars ($1,050.00).

5. That no part of said claim has ever been paid except the sum of fifteen and 5/100 dollars ($15.05), and that there is justly due to said plaintiff for the labor and material aforesaid the sum of one thousand thirty-four and 95/100 dollars ($1,034.95), with interest from August 16th, 1909.

6. That said Henricksen has not yet fully completed his
38 said contract aforesaid with the School District, and that the High School building aforesaid has not been accepted by the School District aforesaid, and that on the 8th day of March, 1910, the plaintiff caused a written notice to be served upon the defendant National Surety Company, specifying the nature and amount of plaintiff's claim and the date of furnishing the last item thereof, and that on the 11th day of March, 1910, plaintiff caused to be served on the said defendant Henricksen, a like notice as the one served on the National Surety Company, a copy of which said notice so served on each of said defendants is marked Exhibit "B," attached to the complaint and is hereby made a part hereof.

7. That the said Henricksen did not pay the plaintiff for its said labor and material, and that by reason of the facts aforesaid, the condition of said bond has been broken to the damage of plaintiff in the aforesaid sum of one thousand thirty-four and 95/100 dollars ($1,034.95).

8. That the allegations contained in the answer of defendant National Surety Company to the effect that said plaintiff, as a foreign corporation, was carrying on, or doing business in this State in violation of the law of this State, relating to foreign corporations, engaged in doing business in this State, are not sustained by the evidence and are untrue.

Conclusions of Law.

That plaintiff is entitled to judgment against said defendants and each of them for the sum of one thousand thirty-four and
95/100 dollars ($1,034.95), with interest thereon from Au-
39 gust 16th, 1909, together with its costs and disbursements herein.

Let judgment be entered accordingly.

By the Court:

WM. A. CANT,
Judge of Said Court.

Dated March 28th, 1911.

Memorandum.

The main questions to be determined in this case are:

1. Whether compliance by plaintiff with the provisions of Chap. 413 Laws 1909, instead of with Section 4539 Revised Laws 1905, was sufficient.

As to this I follow the ruling made upon the demurrer to the complaint for the reasons stated in the memorandum attached thereto.

2. Whether plaintiff is prevented from recovery herein by reason of the provisions of Section 2888 et seq., Revised Laws 1905, relating to foreign corporations. This must be considered here.

Plaintiff is a foreign corporation. It has never complied with the sections above referred to relating to foreign corporations. Defendant Surety Company claims that the transaction here in

question amounted to doing business in this State within the meaning of those sections. Plaintiff denies this claim.

It is the fair meaning of the statute which must be sought. The transaction itself was not morally wrong, and presumably it was beneficial to the citizens of our State. There is no prevailing disposition on the part of the courts to adopt a construction
40 of such statutes which shall be harshly restrictive.

(*a*) The transaction was not within the statute relating to foreign corporations if it constituted interstate commerce. This must be so, and about it there is no dispute.

(*b*) If it shall be determined that the transaction was not interstate commerce, still it was not necessarily within the prohibition of the statute. The question is whether defendant "was doing business" within the State.

The question is fairly resolvable in favor of plaintiff upon either of these points.

The transaction was essentially the sale and delivery of a manufactured product by a citizen of one State where the commodity was produced to a citizen of another where it was desired for use. There was the incidental work of placing this product in position in the building. That was somewhat more than mere delivery, which is always allowable in connection with interstate commerce, and yet was but an extension of the same idea, and in any event was but incidental to the principal transaction, which was the sale and delivery of the ornamental plaster work. In various cases it is recognized that a variety of incidental or subsidiary actions or business is necessarily allowable as a part of and intimately connected with interestate commerce.

Crutcher vs. Kentucky, 141 U. S. 47, at page 59.
Norfolk & Western Railroad Company vs. Pennsylvania, 136 U. S. 114, at page 120.

41 Nothing can destroy the character of this transaction as interstate commerce unless it be the circumstance that the ornamental work was placed in position by men in plaintiff's employ. If such placing in position, which requires the services of skilled workmen, should be held to be doing business in this State, it would be a serious blow at what must be regarded by every one as essentially interstate commerce. A citizen of Illinois is engaged in the manufacture of a commodity which is in demand and is designed for sale in all the adjoining States. A citizen of Minnesota desires to purchase and use such product. He makes a contract in Illinois for a quantity thereof. He has no men who can properly set in place the product so purchased. Therefore, in connection with his purchase and as a part thereof, he contracts for the services of skilled men to perform this work. Without such services he could not purchase at all, and this item of interstate commerce would fail. It is true that some limitation must be placed upon the services which may be rendered or carried on in this State and in this way by a foreign corporation. If the main business of the corporation be to furnish or perform service of a certain kind, we may well understand that it cannot be permitted to carry on such

work or perform such service regularly and continuously in this State. That would not be commerce in any correct use of that term, and it would be a carrying on of the usual business of the corporation in this State. But where the transaction is essentially the sale of a commodity, and incidental thereto and in support or furtherance of the commercial transaction, some necessary service is involved, it may well be held that the transaction does not
42 thereby change its character, and that when such a transaction takes place, as it did here, it may properly be characterized as interstate commerce. Such must have been the theory of the court and the test applied in

Milan Milling, etc. Co. vs. Gorten, 93 Tenn. 590, and
Caldwell vs. North Carolina, 187 U. S. 622.

Authorities involving a sale of commodities which are imported from one State into another, and, in immediate connection therewith, the performance of service about or upon such commodities, are not numerous.

The two foregoing are of that class, but they do not go very far. The case which goes to the greatest length in plaintiff's favor and about which there might be much greater doubt than with the case at bar is that of Oakland Sugar Mill Co. vs. Fred W. Wolf Co., 118 Fed. 239, at pages 245 and 246. The opinion therein was written by Mr. Justice Lurton of the Supreme Court of the United States when a member of the Circuit Court of Appeals for the Sixth Circuit. In that case an Illinois corporation undertook to furnish all the engines, boilers, machinery, and so forth, necessary to fully equip a certain beet sugar factory in the State of Michigan and to install the same within such factory. Though much of such equipment was manufactured by the Illinois corporation at its plant in Chicago, a considerable part thereof was purchased by such corporation from dealers in the State of Michigan. There was evidence tending to show that the Illinois corporation "was engaged in the business of constructing and equipping manufacturing plants within the
43 State of Michigan which involved in some instances not only the equipping of such factories with machinery, but the actual planning and constructing of the factory buildings also," and in carrying out the contract in question there was evidence that such corporation employed in Michigan from twenty-five to one hundred men for several months and that these men were paid with money deposited in a Michigan bank for that purpose. It was held that all this, and much more concerning other contracts, both before and immediately after the performance of the contract in question, did not, as a matter of law, require a finding by the jury that the business was other than interstate. Much less do the facts in the case at bar require a finding by the court in favor of the defendant.

The defendant has cited two cases which are authorities in its favor. They are St. Louis Exterior Metal, etc. Co. vs. Beilharz, 88 S. W. 512, and Portland Co. vs. Hall & Grant Construction Co., 106 N. Y. Supp. 649. My opinion is that this Court should follow

the Federal authorities. Those courts are the final arbiters in questions of this character, and those and the other authorities which are cited herein represent the prevailing views upon these questions.

If, however, it be determined that the transaction was not interstate commerce, the conclusion does not necessarily follow that it amounted to doing business in this State within the meaning of the statute. The purpose of the statute must be kept in mind. That is, to subject foreign corporations doing business in this State to the process of its courts and perhaps to a license tax.

44 Dunlop vs. Mercer, 156 Fed. 545, at page 557.
Gunn vs. White Sewing Machine Co., 57 Ark. 46-47.

Through the operation of state comity and in the absence of specific legislation to the contrary, foreign corporations generally are authorized to contract as freely as individuals. It may be presumed that there is no intent to violate this state comity further than is really necessary to subserve some rightful and wholesome purpose. The purpose of the statute here in question is as above indicated. Manifestly it was not designed to interfere with occasional or isolated transactions. It was aimed at those engaged in a business which is in some sense established. The language of section 2888 (supra) "or to continue business herein if already established" indicates this. The statute has in contemplation a business already established at the time the law was enacted or one thereafter to be established. We have no established business to deal with here. Again, the same section provides that such foreign corporations "shall have and maintain a public office or place in this State for the transaction of its business." The statute has in contemplation such business as fairly requires an office or settled place for the transaction thereof. Of course, no such thing was necessary in connection with sending two workmen to Eveleth to perform the service which was involved in the transaction here under consideration. No one would think or suggest such a thing.

It appears from the evidence that from time to time plaintiff has been interested in certain transactions with citizens of this
45 State. There has been nothing like continuity in these dealings. They were isolated transactions, occurring at irregular intervals of time. Some of them were such as undeniably to be interstate commerce. It has had no capital invested in this State. It has had no headquarters. All the transactions were the result of negotiations which were finally closed at the home office of the plaintiff in the State of Illinois. They were limited in number and extended over a period of years. The one here in question stood entirely by itself. It would require a conscious effort to hold that sending these two workmen to Eveleth to place in position the ornamental plaster work which had been sold in Chicago and shipped therefrom constituted a doing business within this State. Ordinarily the incident would not be characterized by the use of any such term.

The following expression of Mr. Justice Matthews in Cooper Manufacturing Co. vs. Ferguson, 113 U. S. 727, cited in Milan, etc.

Co. vs. Gorten, 93 Tenn., 590 at page 596, is significant of the true meaning and construction which should be placed upon statutes of this kind: "It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that State and to prohibit it from carrying on within that State its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States." After making use of such quotation, the Tennessee case refers to a foreign corporation which had established a lum-
46 ber yard in that State and was engaged in the sale of lumber at retail therefrom—a plain example of a class to which clearly the statute was intended to apply.

In Penn Collieries Co. vs. McKeever, 183 N. Y. 98, is an expression at some length of views upon this phase of the case, which commend themselves as sound and wholesome. If they are to prevail in this State it will follow that the transaction here under consideration did not constitute doing business in Minnesota within the meaning of the law. That case had already been cited with approval in W. H. Lutes Co. vs. Wysong, 100 Minn. 112, and also in Lathrop-Shea & Henwood Co. vs. Interior Const. & Imp. Co., 150 Fed. 671, and under these decisions this court should hold that the transaction here in question did not constitute doing business in this State.

Filed in my office Mar. 28, 1911.
J. P. JOHNSON,
Clk Dist. Court,
By R. E. JOHNSON, *Deputy.*

47 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Amount of Judgment or Verdict.

Amount of Judgment or Verdict	$1,034.95
Interest on same from the — day of —— 190–	105.23

P'ff's Costs and Disbursements.

Statutory costs	$10.00
Affidavits	1.00
Acknowledgements	3.30
Sheriff's fees, Service of summons	
Jury Fees	
Clerk's fees (to be added)	4.00

Service of the within bill of costs and disbursements is hereby acknowledged, notice of taxation thereof is hereby waived.
Dated April 26th, 1911.

BALDWIN, BALDWIN & DANCER AND
WASHBURN, BAILEY & MITCHELL,
Att'ys for Def't Nat. Surety Co.

The above bill of costs and disbursements taxed and allowed at Total Amount, $1158.48.
Dated May 1st, 1911.

J. P. JOHNSON, *Clerk*,
By R. E. JOHNSON, *Deputy Clerk*.

Affidavit of Disbursements.

STATE OF MINNESOTA,
County of St. Louis, ss:

A. L. Agatin being duly sworn, says on oath, that he is the attorney of the plaintiff in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above entitled action; and that the foregoing items of disbursements, and each item thereof, have been actually and necessarily paid or incurred therein, by and on behalf of said plaintiff;

A. L. AGATIN.

Subscribed and sworn to before me, this 26th day of April, 1911.
[SEAL.] C. C. COLTON,
Notary Public, St. Louis County, Minn.

My Commission expires Nov. 1, 1914.
[SEAL.]
Filed in my office May 1, 1911.
J. P. JOHNSON, *Clk Dist. Court*,
By R. E. JOHNSON, *Deputy*.

48 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

STATE OF MINNESOTA,
County of St. Louis, ss:

A. L. Agatin being first duly sworn, deposes and says that he is the attorney of record for the judgment creditor in the above en-

titled action: that to the best of his knowledge, information and belief the full name of the judgment creditors is Henry C. Henricksen and National Surety Company; that the occupation and business, place of residence of said defendants are as follows:

Henry C. Henricksen, Contractor, 325 N. 59th Ave. W., Duluth, Minnesota.

National Surety Co., Surety Business, corporation, New York City, New York.

Further affiant sayeth not, except that this affidavit is made in pursuance to the provisions of Chapter 122 of the General Laws of the State of Minnesota for the year 1903.

A. L. AGATIN.

Subscribed and sworn to before me this 1st day of May, 1911.

[SEAL.] R. E. JOHNSON,
Deputy Clerk of Dist. Court, St. Louis County, Minn.

Filed in my office May 1, 1911.

J. P. JOHNSON, *Clk Dist. Court,*
By R. E. JOHNSON, *Deputy.*

49 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Judgment,

May 1*st*, 1911.

This cause, having been regularly placed upon the calendar of the above named court for the January, A. D. 1911, general term thereof, came on for trial before the court on the 28th day of February, A. D. 1911; and the court, after hearing the evidence adduced at said trial, and being fully advised in the premises, did on the 28th day of March, A. D. 1911, duly make and file its findings and order for judgment herein.

Now, pursuant to said findings and on motion of A. L. Agatin, attorney for plaintiff,

It is hereby adjudged that the plaintiff recover of the defendants, and each of them, the sum of eleven hundred forty & 18/100 dollars ($1140.18), the amount of said findings and interest to date hereof, together with eighteen & 30/100 dollars ($18.30) costs and disbursements as taxed and allowed, amounting in all to the sum of eleven hundred fifty-eight & 48/100 dollars ($1158.48).

Witness the Honorable Wm. A. Cant, Judge of the District Court

aforesaid, at Duluth, this 1st day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal of District Court.]

J. P. JOHNSON, *Clerk,*
By R. E. JOHNSON, *Deputy Clerk.*

Filed in my office May 1, 1911.

J. P. JOHNSON, *Clk Dist. Court,*
By R. E. JOHNSON, *Deputy.*

District Court, Eleventh Judicial District.

50 STATE OF MINNESOTA,
County of St. Louis, ss:

ARCHITECTURAL DECORATING COMPANY, Plaintiff,
vs.
HENRY C. HENRICKSEN and NATIONAL SURETY COMPANY,
Defendants.

Stipulation for Appeal, etc.

Whereas, pursuant to the order for judgment heretofore made in said cause, judgment for the sum of $1158.48 has this day been made and entered in the above entitled action in favor of plaintiff and against the defendants, and the defendant National Surety Company, desires to appeal from said judgment and the whole thereof, to the Supreme Court of the State of Minnesota, and possibly to the Supreme Court of the U. S. and the plaintiff is desirous of facilitating such appeal to the end that said cause may be reviewed on appeal as promptly as practicable,—said cause having been (by stipulation of the parties) placed for hearing on the calendar of said Supreme Court for July 19th, 1911.

Now, therefore, it is hereby stipulated and agreed that said appeal has been duly taken by said National Surety Company from said judgment and the whole thereof, any and all notice or notices thereof being hereby in all respects waived, as if due and proper notice of appeal has been duly given and served; that bond or undertakings on appeal is likewise hereby waived, and all proceedings on said judgment hereby stayed, as if proper bond on appeal with supersedeas was duly made, given and served, and Appellant National Surety Company shall cause the return on ap-

51 peal to be filed as soon as practicable and shall have until the 5th day of June, 1911, in which to serve paper book and brief on the Respondent, and Respondent-plaintiff shall have until the 5th day of July, 1911, in which to serve its brief on Appellant, and appellant shall have until July 15, 1911, to serve its brief in reply, and said appeal shall thereupon be argued and submitted as on the merits on July 19, 1911, to said Supreme Court, with the same force and effect, as if said appeal and any and all

prerequisites thereto had been duly taken in strict conformity to the statute in such cases made and provided.

Dated May 1st, 1911.

A. L. AGATIN, *Attorney for Plaintiff.*
WASHBURN, BAILEY & MITCHELL,
BALDWIN, BALDWIN & DANCER,
Attorneys for Defendant National Surety Company.

Filed in my office at — o'clock — M., May 1, 1911.
J. P. JOHNSON, *Clk Dist. Court.*
By R. E. JOHNSON, *Deputy.*

52 STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

I, J. P. Johnson, Clerk of the District Court, St. Louis County, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original Summons & Complaint, Demurrer, Order Overruling Demurrer to Complaint, Separate Answer of Defendant National Surety Company, Affidavit of No Answer, Reply, Findings and Order for Judgment, Notice of Taxation of Costs and Bill of Costs and Disbursements, Affidavit of Identification, Judgment and Stipulation for Appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness, my hand and seal of said Court, at Duluth, this 15th day of May A. D. 1911.

[SEAL.] J. P. JOHNSON, *Clerk,*
By P. C. SUNDLEY, *Deputy.*

17205.

53 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

ARCHITECTURAL DECORATING COMPANY, Plaintiff-Respondent,
vs.
HENRY C. HENRICKSEN et al., Defendants; NATIONAL SURETY COMPANY, Defendant-Appellant.

Assignments of Errors.

1. The Court erred in overruling defendant's demurrer to the complaint herein.

2. The Court erred in holding in effect that Chapter 413 of the General Laws of Minnesota for the year 1909, is applicable to the contract and bond in question in this action, and in holding that

the application of said statute to the bond in question does not violate the obligation of the contract created by the execution and delivery of said bond and is not contrary to Section 11 of Article I of the Constitution of the State of Minnesota or Section 10 of Article I of the Constitution of the United States.

3. The Court erred in finding as a conclusion of law from the facts found by it that the plaintiff is entitled to judgment against the defendant National Surety Company for the reason that the plaintiff did not give to defendant Henricksen or defendant National Surety Company a notice within ninety days after performing its last item of work or furnishing its last item of skill, tools, machinery or material, specifying the nature or amount of its claim or the date of furnishing the last item thereof, as provided by Section 4539 of the Revised Laws of Minnesota for the year 1905, and because, contrary to the provision of Section 11 of Article I of the Constitution of Minnesota and Section 10 of Article I of the Constitution of the United States, the trial court held that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the bond in question in this action.

4. The Court erred in ordering judgment herein against defendant National Surety Company because said judgment is not justified by the Court's findings of fact and is contrary to law.

5. The Court erred in ordering judgment herein against defendant National Surety Company because said judgment is in violation of the constitutional provisions hereinbefore referred to.

Inasmuch as all of said assignments of error involve the same question we shall consider them as one throughout this brief.

WASHBURN, BAILEY & MITCHELL AND
BALDWIN & BALDWIN,
Attorneys for National Surety Company,
Defendant-Appellant, Duluth, Minnesota.

(Endorsed: Filed June 12, 1911. I. A. Caswell, Clerk.

54 No. 17205.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911—Simpson, J.

ARCHITECTURAL DECORATING COMPANY, Respondent,
vs.
HENRY C. HENRICKSEN et al., Defendants; NATIONAL SURETY COMPANY, Appellant.

Opinion and Syllabus.

Filed August 4, 1911.

I. A. CASWELL, *Clerk.*

55 17205.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.
No. 243.

ARCHITECTURAL DECORATING CO, Respondent,
v.
NATIONAL SURETY COMPANY, Appellant.

Syllabus.

Chap. 413, G. L. 1909 changing the requirement as to notice of claims upon bonds of public contractors, affects the remedy provided for the enforcement of such bonds and not the obligation thereof, and is applicable to claims arising subsequent to its enactment upon bonds given prior to its enactment.

Affirmed.

56 17205.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 243.

ARCHITECTURAL DECORATING COMPANY, Respondent,
v.
NATIONAL SURETY COMPANY, Appellant.

Opinion.

This is an action to recover damages for breech of a bond, given by the defendant surety company, arising from a failure in the payment of a claim for labor and material furnished by the plaintiff for the erection of a public high school building. Upon a trial of the action by the court judgment was entered in favor of the plaintff and against the defendant surety company. The defendant appeals from the judgment.

The facts as found by the court are: On October 8, 1908, the defendant Henricksen entered into a contract with School District No. 39 for the erection of a high school building at Eveleth, and in order to give the same validity Henricksen, as principal, and defendant National Surety Company, as surety, on or about October 17, 1908, made and delivered to said School District, for the use of all persons doing work or furnishing skill and materials, a bond for the payment of all claims for such labor or material. Henricksen entered upon performance of this con-
57 tract. Between July 16 and August 16, 1909, the plaintiff furnished labor and material for the high school building,

which was used therein, of the value of $1050. No part of this sum was paid. At the time of the commencement of this action Henricksen had not completed the contract for the erection of the high school building and the building had not been accepted by the School District. Before beginning this action the plaintiff, on March 8, 1910, served a written notice on the defendant surety company and also on Henricksen, specifying the nature and amount of its claim and the date of furnishing the last item. Thereafter this action was brought to enforce plaintiff's claim against the surety company on its bond. The sufficiency of the notice so given on March 8, 1910, is the sole question involved upon this appeal.

Sec. 4539 R. L. 1905, the law in force at the time the contract for building the high school was entered into and the bond given, provided:

"No action shall be maintained on any such bond unless, within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of fur-
58 nishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

This law was amended by Chap. 413 G. L. 1909 to read as follows:

"No action shall be maintained on any such bond unless, within ninety days after the completion of the contract and acceptance of the building by the proper public authorities, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice."

The notice given by the plaintiff was not in time under Sec. 4539 R. L. 1905, but was given within the limited time if Chap. 413 G. L. 1909 was the applicable law. From the statement of facts it will be noted that while the bond under consideration was given prior to the passage of the 1909 law, the plaintiff furnished the items of labor and material here involved, and default occurred in the payment therefor, all subsequent to the passage of such law.

The 1909 amendment, by its terms, does not exclude from its operation bonds executed prior to its passage. Being on its face gen-
eral in its application, it will be construed to apply to bonds
59 executed before as well as those executed after its passage unless such construction would render the statute invalid because of the resulting impairment of the obligation of contracts entered into prior to its passage. Would the later statute, if made applicable to the bond of the surety company given before the statute was passed, change the obligation assumed by the company in such bond? If it would, then without question such statute is ineffectual to make such change. On the other hand, if the change in the statute changes the required procedure for enforcing the obligation of the bond, leaving the reciprocal rights and obligations under the bond unimpaired and enforcible, then it is equally clear that the later

statute is valid as applied to the bond, and determines the notice required to be given as a condition to the enforcement of the liability thereunder. The undertaking of the surety company in the bond in question is: "If the said Henry C. Henricksen shall pay, as they become due, all just claims for work, material, etc., then this obligation shall be void, but otherwise of full force and effect." This defines the obligation of the company. By payment of claims for work and material after the failure of Henricksen to pay the same as they become due, the surety company would fully discharge its obligation and nothing more. The provision requiring notice to be given to the company does not create or enlarge this obligation. It is simply an essential step in the enforcement of an existing obligation, and clearly affects the remedy and not the substantive rights of the
60 parties under the bond. The fact that his statute must be construed as if it were a part of the written bond, and that it places a condition or burden upon the beneficiaries of the bond which they must perform before they can avail themselves of its benefits, does not indicate that the giving of the notice is a condition to the creation of the obligation. It is a condition precedent to the bringing of the action—a necessary step in the enforcement of the remedy. Chap. 413 G. L. 1909 therefore effected a change in the remedy for a breach of the obligation of the bond, and is applicable to claims arising after its passage, whether such claims arise upon bonds given before or after its passage, and being so applicable, it does not impair or enlarge the obligation of the bond.

Affirmed.

SIMPSON, J.

61 No. 17205.

STATE OF MINNESOTA:

Supreme Court.

ARCHITECTURAL DECORATING COMPANY, Respondent,

vs.

H. C. HENDRICKSON et al., Defendants; NATIONAL SURETY COMPANY Appellant.

Judgment Roll.

Filed August 18, 1911.

I. A. CASWELL, *Clerk.*

62 STATE OF MINNESOTA:

Supreme Court.

Copy of Minutes of Argument

Filed August 18, 1911.

I. A. CASWELL, *Clerk.*

63 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1911.

MONDAY MORNING, 9.30 *o'clock, July* 17, *A. D.* 1911.

Court convened pursuant to adjournment. All the justices being present.

Reg. No. 17205, Cal. No. 243.

ARCHITECTURAL DECORATING COMPANY, Respondent,
vs.
HENRY C. HENDRICKSON et al., Defendants; NATIONAL SURETY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*
By —— ——, *Deputy.*

64 17205.

STATE OF MINNESOTA:

Supreme Court.

Copy of Order for Judgment.

Filed August 18, 1911.

I. A. CASWELL, *Clerk.*

65 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 243.

ARCHITECTURAL DECORATING COMPANY, Respondent,
vs.
HENRY C. HENDRICKSON et al., Defendants; NATIONAL SURETY COMPANY, Appellant.

Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the General April Term of this court, A. D. 1911, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered August 18, A. D. 1911.

By the Court:

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

66 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the City of St. Paul, August 18, A. D. 1911.

[SEAL.] I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA:

Supreme Court.

Transcript of Judgment.

Filed August 18, 1911.

I. A. CASWELL, *Clerk.*

67 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1911.

No. 243.

ARCHITECTURAL DECORATING COMPANY, Respondent,
vs.
HENRY C. HENDRICKSON et al., Defendants; NATIONAL SURETY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause August 18, A. D. 1911.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court

of the Eleventh Judicial District, sitting within and for the County of St. Louis, be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said National Surety Company, Appellant herein, the sum and amount of Fifty-five and 60/100 Dollars ($55.60), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed August 18, A. D. 1911.

By the Court:

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25.00
Printer's fees	15.60
Clerk's fees, Supreme Court	15.00
Affidavits and Acknowledgements	
Return	
Postage and express	
Filing Mandate	
	$55.60

68 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Architectural Decorating Company, Respondent, vs. Henry C. Henrickson et al., Defendants, and National Surety Company, Appellant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the Capitol, in the City of St. Paul, August 29, A. D. 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, State of Minnesota.

69 Supreme Court, State of Minnesota.

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

Assignment of Errors.

And now comes the National Surety Company, plaintiff in error, and makes and files this, its assignment of errors:

1. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in overruling plaintiff in

error's demurrer to defendant in error's complaint herein, which said demurrer was upon the ground that the facts stated in defendant in error's complaint do not constitute a cause of action in that the notice therein alleged to have been served upon the plaintiff in error was not served as required by Section 4539, Revised Laws of Minnesota 1905, and that Chapter 413, General Laws of Minnesota for the year 1909, providing for notice at and within a different time than that provided for in said Section 4539, cannot apply to the bond and contract in question; that to apply it to the bond in question would impair the obligation of plaintiff in error's contract in violation of Section 10 of Article I of the Constitution of the United States.

2. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in holding in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the contract and bond in question in this action, and in holding that the application of said statute to the bond in question does not violate the obligation of the contract created by
70 the execution and delivery of said bond, and in further holding that the application of said statute is not contrary to Section 10 of Article I of the Constitution of the United States.

3. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in ordering judgment herein against plaintiff in error, National Surety Company, because said judgment is in violation of Section 10 of Article I of the Constitution of the United States.

4. The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, for the aforesaid reasons.

5. The Supreme Court of the State of Minnesota erred in holding in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the contract and bond in question in this action, and in holding that the application of said statute to the bond in question does not violate the obligation of the contract created by the execution and delivery of said bond, and in further holding that said statute, as applied to this case, is not contrary to Section 10 of Article I of the Constitution of the United States.

6. The Supreme Court of the State of Minnesota erred in holding in effect that the notice served upon plaintiff in error by defendant in error, under and pursuant to Chapter 413 of the General Laws of Minnesota for the year 1909, is sufficient, in that said holding is in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the contract and bond in question, and that such application of said Chapter 413 impairs the obligation of the plaintiff in error's contract in violation of Section 10 of Article I of the Constitution of the United States.

WASHBURN, BAILEY & MITCHELL AND
BALDWIN & BALDWIN,
Attorneys for Plaintiff in Error,
National Surety Company.

71 [Endorsed:] Original. No. 17205. State of Minnesota, County of St. Louis. Supreme Court. National Surety Company, Plaintiff in Error, vs. Architectural Decorating Co., Defendant in Error. Plaintiff in Error's Assignment of Errors. Washburn, Baldwin & Baldwin, Attorneys at Law, 300-306 First National Bank Building, Duluth, Minnesota. Filed Aug. 19, 1911. I. A. Caswell, Clerk.

72 Supreme Court of the State of Minnesota.

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

Petition.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of the National Surety Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of New York and duly licensed to do business in the State of Minnesota, respectfully shows:

1. That heretofore and on or about the 17th day of March, 1910, an action was commenced in the District Court, Eleventh Judicial District in and for the County of St. Louis and State of Minnesota, by the Architectural Decorating Company, a corporation organized, created and existing under and by virtue of the laws of the State of Illinois, as plaintiff, against your petitioner, National Surety Company, as one of the defendants. The complaint in said action alleged that, on or about the 8th day of October, 1908, one Henry C. Henricksen made and entered into a contract or agreement with School District No. 39 in St. Louis County, Minnesota, a public corporation, organized under the laws of the State of Minnesota, for public school purposes, by the terms of which he, among other things, agreed to provide all the materials and perform all the work for the erection and completion of a certain public building, to-wit, a brick high school building at the City of Eveleth in St. Louis County,
73 Minnesota, according to certain plans and specifications therefor, for the agreed price of $58,300.00.

2. That said Henricksen, to carry out said contract and give the same validity under the laws of this state in such case made and provided, thereafter executed, as principal, with the National Surety Company, as surety, for the use of said School District and of all persons doing work or furnishing skill, tools, machinery or materials under or for the purpose of such contract, a certain bond, conditioned for the faithful performance of said contract and for the payment of all such labor or material claims.

3. That thereafter, and between the 16th day of July, 1909 and the 16th day of August, 1909, said defendant in error, at the special instance and request of said Henricksen, and for the purpose of enabling said Henricksen to carry out said contract with said School

District, as aforesaid, furnished certain labor and material, consisting of ornamental plaster work for and on account of said contract; that said material was of the reasonable value and worth of $1050.00; that said Henricksen failed and neglected to pay any part thereof, excepting the sum of $15.05; and that on the 8th day of March, 1910, said defendant in error caused a written notice to be served upon the plaintiff in error, National Surety Company, specifying the nature and amount of defendant in error's claim and the date of furnishing the last item thereof, pursuant to certain of the laws, hereinafter mentioned and set forth, and that on the 11th day of March, 1910, defendant in error caused to be served on the said Henricksen a like notice as the one served on the said National Surety Company, as aforesaid.

4. Said complaint prayed that said defendant in error have judgment against said Henricksen and said plaintiff in error, National Surety Company, and each of them, for the sum of $1034.95, with interest thereon from August 16, 1909, at the rate of six per
74 cent per annum, and for its costs and disbursements therein.

5. That at the time of the execution and delivery of said bond, with said Henricksen as principal and plaintiff in error, National Surety Company, as surety, as aforesaid, there was in force and effect in this state a certain statutory provision, known and described as Section 4535 of the Revised Laws of Minnesota for the year 1905, which read as follows:

"4535. Bonds of public contractors—Penalty.—No contract with the state or with any municipal corporation or other public board or body thereof, for the doing of any public work, shall be valid for any purpose, unless the contract shall give bond to the state or other body contracted with, for the use of the obligee, and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payments, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified, and for compliance with the laws appertaining thereto. The penalty of such bond shall be not less than the contract price."

That at the same time, Section 4539, Revised Laws of Minnesota, 1905, having reference to the bond or bonds mentioned in Section 4535, Revised Laws of Minnesota for the year 1905, read as follows:

"4539. Limit of time to bring action.—No action shall be maintained on any such bond unless, within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claims and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

That by an act of the Minnesota Legislature, approved April

22, 1909, Section 4539 of the Revised Laws of Minnesota for the year 1905 was amended so as to read as follows:

"An Act to amend section four thousand five hundred and thirty-nine (4539) of the Revised Laws of Minnesota, 1905, relating to actions on bonds of public contractors.

Be it enacted by the Legislature of the State of Minnesota:

Limit of time to bring action.—SECTION 1. That section four thousand five hundred and thirty-nine (4539) of the Revised Laws of Minnesota, 1905, be and the same is hereby amended so as to read as follows:

75 "4539. Limit of time to bring action—No action shall be maintained on any such bond unless, within ninety days after the completion of the contract and acceptance of the building by the proper public authorities, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice."

"SEC. 2. This act shall take effect and be in force from and after its passage."

"Approved April 22, 1909."

6. That said Henricksen neither demurred nor answered in said proceeding and made default therein. Your petitioner demurred to the complaint of the said Architectural Decorating Company in the said matter upon the ground and for the reason that said complaint did not, and does not, state facts sufficient to constitute a cause of action as against it, the said plaintiff in error, its contention being that the said amendment to Section 4539, Revised Laws of Minnesota, 1905, by act of Legislature, approved April 22, 1909, as aforesaid, and known as Chapter 413 of the Laws of Minnesota, 1909, is not retroactive and that to hold that said amendment applies to this case would be to impair the obligation of your petitioner's contract with said School District, entered into prior to the enactment and passage of said amendment. That said original law, known as Section 4539 Revised Laws of Minnesota, 1905, became and was a material part of the obligation of your petitioner's said contract, and that to hold that said amendment applies would be to impair the obligation thereof in violation of Section 10 of Article I of the Constitution of the United States.

7. That upon the hearing on said demurrer, on the 16th day of December, 1910, the District Court of St. Louis County, Minnesota, Eleventh Judicial District, overruled said demurrer and allowed said plaintiff in error to answer said complaint; that thereafter your petitioner duly answered said complaint, and the defendant in error duly replied thereto.

76 8. That subsequently the issues raised by said pleadings came on for trial at the January, 1911, term of said court, before Judge William A. Cant of said court, and said court made its

Findings of Fact and Conclusions of Law, upon and pursuant to which judgment was entered in favor of defendant in error and against plaintiff in error, for the sum of $1158.48. That thereafter an appeal was taken by your petitioner from said judgment to the Supreme Court of the State of Minnesota, and that on or about the 18th day of August, 1911, an order was entered in the office of the clerk of said Supreme Court of the State of Minnesota, which order affirmed said judgment, and on the said 18th day of August, 1911, judgment upon said appeal was thereupon entered in the office of the clerk of the Supreme Court of the State of Minnesota.

9. That upon said trial and upon said appeal, your petitioner duly argued, insisted and asked that said demurrer should be sustained, and that said judgment should be reversed on the ground and for the reason that it appears from the complaint in said action that the notice required to be served upon plaintiff in error by the defendant in error herein was not served within the time required by law, and that to hold that such notice was served within said time would be to impair the obligation of your petitioner's said contract.

10. That said decisions of said courts and judges, and each of them, held that said amendment of said law did not impair the obligation of your petitioner's said contract; that in said decisions, and each of them, was drawn in question the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States, and said decisions, and each of them, were in favor of the validity of said statute.

77 Wherefore, your petitioner prays that a writ of error may issue and that it be allowed to take up for review before the Supreme Court of the United States said order and judgment of said Supreme Court of the State of Minnesota, and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

NATIONAL SURETY COMPANY,
By WASHBURN, BAILEY & MITCHELL AND
BALDWIN & BALDWIN,
Duluth, Minnesota, Petitioner's Attorneys.

Above petition granted and writ of error allowed herein, and security fixed in the sum of $2500.00, the same to operate as a supersedias herein.

Dated August 19, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

78 [Endorsed:] Original. No. 17205. State of Minnesota, County of St. Louis. Supreme Court. National Surety Company, Plaintiff in Error, vs. Architectural Decorating Company, Defendant in Error. Petition. Washburn, Bailey & Mitchell, Suite 1200 Alworth Bldg., Duluth, Minn. and Baldwin & Baldwin, Attorneys at Law, 300-306 First National Bank Building, Duluth, Minnesota. Filed Aug. 19, 1911. I. A. Caswell, Clerk.

79 To the Honorable the Supreme Court of the United States:

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

Prayer for Reversal.

And now comes the National Surety Company, plaintiff in error, and prays for a reversal of the order of the Supreme Court of the State of Minnesota, entered in the office of the clerk of said Supreme Court of the State of Minnesota on or about the 18th day of August, 1911, which said order affirmed the judgment of the District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, in the action brought by Architectural Decorating Company, as plaintiff-respondent, against National Surety Company, as defendant-appellant, which said Company was impleaded with Henry C. Henricksen, who made default, and which said last mentioned judgment was entered in the office of the Clerk of said District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, on or about the first day of May, 1911; and it also prays for a reversal of the judgment in said action of the Supreme Court of the State of Minnesota, entered in the office of the clerk of the Supreme Court in and for the State of Minnesota on the 18th day of August, 1911.

WASHBURN, BAILEY & MITCHELL AND
BALDWIN & BALDWIN,
Attorneys for Plaintiff in Error,
National Surety Company.

80 [Endorsed:] Original. No. 17205. State of Minnesota, County of St. Louis. Supreme Court. Architectural Decorating Co., Plaintiff in Error, vs. National Surety Company, Defendant in Error. Prayer for Reversal. Washburn, Bailey & Mitchell, Suite 1200 Alworth Bldg., Duluth, Minn. and Baldwin & Baldwin, Attorneys at Law, 300-306 First National Bank Building, Duluth, Minnesota. Filed Aug. 19, 1911. I. A. Caswell, Clerk.

81 STATE OF MINNESOTA:

Supreme Court.

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

Undertaking.

I hereby approve of the within bond and surety therein.
Dated Aug. 19, 1911.

CHAS. M. START,
Chief Justice Sup. Ct. Minn.

Filed August 19, 1911.

I. A. CASWELL, *Clerk.*

82 STATE OF MINNESOTA:

Supreme Court.

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

Undertaking.

Whereas lately, in the Supreme Court of the State of Minnesota, in a suit pending in said court between Architectural Decorating Company, Appellee, and National Surety Company, Appellant, judgment was rendered against said appellant, National Surety Company, and the said appellant having obtained a writ of error to reverse the judgment, rendered in said action by the Supreme Court of the State of Minnesota on August 18, 1911;

Now, therefore, we, Fidelity and Deposit Company of Maryland, a corporation duly organized, created and existing under and by virtue of the laws of the State of Maryland and duly licensed to do business and act as surety in the State of Minnesota, do undertake, promise and agree to and with the above named defendant in error that the above named plaintiff in error shall prosecute its said writ of error to effect, and if it fails to make its plea good, shall answer all damages and costs and shall pay the amount directed to be paid by said judgment, if it is affirmed; conditioned, however, that the liability hereunder shall not exceed the sum of Twenty-five Hundred Dollars ($2500.00).

Dated this 19th day of August, 1911.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
By W. D. BAILEY, *Its Attorney in Fact.*

Attest:
[SEAL.] C. J. O'DONNELL, *Its Agent.*

Signed, Sealed and Delivered in Presence of—
E. E. HEWITT.
J. T. PEARSON.

83 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 19th day of August, 1911 personally appeared before me W. D. Bailey, who, being duly sworn, deposes and says that he is an attorney-in-fact for Minnesota of the Fidelity and Deposit Company of Maryland; that the seal affixed to the foregoing is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said W. D. Bailey acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] JOHN T. PEARSON,
Notary Public, St. Louis Co., Minn.

My commission expires Jan. 1st, 1915.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the suit between the Architectural Decorating Company as defendant in error, and the National Surety Company as plaintiff in error, wherein was drawn in question the validity, under the Constitution of the United States, of a statute of the State of Minnesota alleged to violate the obligation of a contract, and the decision was in favor of the validity of such statute, a manifest error hath happened to the great damage of said National Surety Company, as by its answer appears, and as is said; We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

85 Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this 19th day of August, A. D. 1911.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

LOUISE B. TROTT,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Writ allowed this 19th day of August, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

86 [Endorsed:] 17205. National Surety Company, Plaintiff in Error, vs. Architectural Decorating Co., Defendant in Error. Writ of Error. Filed Aug. 19, 1911. I. A. Caswell, Clerk.

87 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on August 19, 1911, in the matter of the National Surety Company vs. Architectural Decorating Company,

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the Capitol, in the City of St. Paul, this August 29, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minnesota.

88 UNITED STATES OF AMERICA, *ss:*

To the Architectural Decorating Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the District of Columbia, within thirty days after the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Minnesota, wherein the National Surety Company is plaintiff in error and the Architectural Decorating Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 19th day of August, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

89 [Endorsed:] 17205. National Surety Company, Plaintiff in Error, vs. Architectural Decorating Co., Defendant in Error. Citation. Due and personal service of the within citation by copy and by exhibition of the original is hereby admitted at Duluth, Minnesota, this 21st day of August, 1911. A. L. Agatin, Attorney for Defendant in error. Filed Aug. 22, 1911. I. A. Caswell, Clerk.

90 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the City of St. Paul, this August 29, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minnesota.

Endorsed on cover: File No. 22,855. Minnesota Supreme Court. Term No. 425. The National Surety Company, plaintiff in error, vs. The Architectural Decorating Company. Filed September 11, 1911. File No. 22,855.

Supreme Court of the United States

October Term, 1913.

No. 488.

THE NATIONAL SURETY COMPANY, Plaintiff in Error,

vs.

THE ARCHITECTURAL DECORATING COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR

J. L. WASHBURN,
WM. H. BAILEY,
OSCAR MITCHELL,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1912.

No. 425.

THE NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

THE ARCHITECTURAL DECORATING COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here on writ of error to the Supreme Court of the State of Minnesota.

On October 17th, 1908, one H. C. Henricksen as principal, and plaintiff in error as surety, executed and delivered to School District No. 39, St. Louis County, a public corporation of the State of Minnesota, a building contractor's bond in the form required by statute, for the benefit of said school district and all who furnished labor or material, which bond was given to secure the performance of a contract between Henricksen and the school district, dated October 8, 1908 (Record, Folios 9-12).

The bond was executed and delivered under the provisions of Minnesota statute found in Sections 4535 to 4539 inclusive, "Revised Laws, 1905," which statute required every public corporation of the state on entering in-

to a contract requiring the furnishing of labor and material to take a bond for its own use, and for that of all persons furnishing labor or material in carrying out the contract, and gave to persons so furnishing labor or material, and performing certain conditions, power and authority to maintain an action upon the bond.

The above named Architectural Decorating Company, between July 16, 1909, and August 16, 1909, performed services and furnished material to the said Henricksen for use in carrying out said contract, upon which a balance was due and remained unpaid of One Thousand Thirty-four and 95/100ths Dollars ($1034.95).

An action was brought by the Decorating Company against the plaintiff in error upon said bond to recover said amount.

The statute in force and under the provisions of which the bond was executed and delivered contained a provision which in effect limited the right of third persons to maintain an action upon the bond to those who, within ninety (90) days "after performing the last item of work or furnishing the last item of skill, tools, machinery or material," served a written notice upon the surety specifying the nature and amount of claim, and date of furnishing last item.

On April 22, 1909, the statute was amended so as to provide for the notice of claim to be given within ninety (90) days:

> "After the completion of the contract and acceptance of the building by the proper public authorities,"

instead of withnin ninety (90) days:

> "After performing the last item of work or furnishing the last item of skill, tools, machinery or material,"

as provided by the law under which the bond was executed and delivered.

The Decorating Company did not give notice to the surety as provided by the law in force at the time the bond was executed and delivered, but did give notice that would have been in compliance with the amended act passed after the bond was executed and delivered. (The last item of material was furnished on August 16, 1909, and the notice was not served until March 8, 1910, Record, Complaint Fol. 7; Memorandum of Trial Court, Fol, 22; Finding of Fact, Fols. 37, 38).

These facts appear upon the face of the complaint, and plaintiff in error demurred to the complaint (Fol. 21). It was contended in support of the demurrer that the amendment of 1909, passed after the bond had been executed and delivered, could not apply to this bond, and if the law was so construed it would be void as impairing the obligation of plaintiff in error's contract.

This point was squarely passed upon by the trial court in overruling the demurrer (Fol. 23).

The plaintiff in error thereupon answered, and the action proceeded to trial and final judgment in favor of the Decorating Company and against plaintiff in error, which judgment was entered on May 1, 1911, for Eleven Hundred Fifty-eight and 48/100 Dollars ($1158.48). Appeal was taken from this judgment to the Supreme Court of the State of Minnesota, where the judgment was affirmed by opinion filed and judgment entered August 18, 1911 (Fol. 65).

The Supreme Court of the State of Minnesota expressly held that the Act of 1909, passed after the bond

was executed and delivered, controlled and gave to the same force and effect, and overruled the contention of the plaintiff in error that the same was void because it impaired the obligation of plaintiff in error's contract. (Fols. 58-60).

The only question to be determined, or that need be considered in this court is, whether or not Chapter 413 of the General Laws of Minnesota for 1909, if construed to apply to the bond in question, issued and delivered before its passage, impairs the obligation of the contract contained in said bond and is therefore void.

On February 13th, 1891, the Minnesota State Supreme Court decided the case of *Breen vs. Kelly* in which it was held that plaintiff furnishing work and material could not recover on the building contractor's bond given to Hennepin County, Minnesota, "for the use of all persons who may do work or furnish materials pursuant to the contract" etc., and conditioned that the contractor:

> "Shall save and secure the County of Hennepin harmless, and shall pay all just claims for all work done and to be done, and all materials furnished and to be furnished pursuant to said contract, and in the execution of the work therein provided for, as they shall become due hereafter."

This decision was based upon the ground that Hennepin County, being a public corporation of Minnesota, had no implied power to receive a bond for the benefit of the labor and material men.

On August 7, 1894, a building contract bond was given by Sykes as principal, and Brooks and Hazelet as sureties, to the Village of St. James, a public corporation of Minnesota, by which the principal and sureties were bound to the village in the sum of seven thousand dollars,

which bond was conditioned, among other things, that the principal should:

> "Pay for all labor and materials employed in the construction thereof, and in all things perform his said contract."

The contractor failed to pay for materials, and an action was brought by the material men upon this bond. The Minnesota Supreme Court in *Park Brothers & Company vs. Sykes*, 67 Minnesota, 153, (1897), held there could be no recovery upon the ground that at the time the bond was given there was no authority in the village to take such security for the benefit of third persons.

By Chapter 354 of the General Laws of 1895, approved April 24, 1895, the Minnesota legislature passed an act entitled:

> "An act providing for the giving of bonds by contractors for public works and improvements, and for the better security of the state and the public corporations thereof, and parties performing labor and furnishing material therefor."

By Section 1 it was provided in substance that no contract with the state or any public corporation of the state for the doing of any building or construction work of any kind should be valid unless a bond was given to protect the municipality, and also:

> "For the use of all persons who may perform any work or labor, or furnish any skill or material in the execution of such contract."

And by Section 4 of the act it was provided that any person who furnished labor or material in the performance

of a contract should be deemed a party in interest in the bond, and might bring an action thereon.

Sec. 6 prohibited an action on the bond after one year from the accrual of the cause of action.

This act was passed and went into effect after the bond in the *Sykes* case was given, but before the decision in the Supreme Court on that bond was rendered.

By Chapter 307 of the General Laws of Minnesota for 1897, Sections 1, 4 and 6 of Chapter 354 of the Laws of 1895 were amended. There was no change of any importance in this proceeding in Sections 1 and 4, but in Section 6 the following language was added:

> "No action shall be maintained on any such bond unless the plaintiff *within ninety days after performing the last item of work or furnishing the last item of skill or material* shall serve upon the principal and the surety or sureties in said bond a written notice specifying the nature and amount of plaintiff's claim, and the date of furnishing the last item of said work, skill or material,"

and the prohibition of any action after one year from the accrual of the cause of action retained.

On December 30, 1904, in the case of *Grant vs. Berrisford*, 94 Minnesota, 45, the Minnesota Supreme Court held, with reference to the above provision brought into the statute by the amendment of 1897, that it was a condition precedent to the right to bring an acion on the bond, and that it was not analogous to a statute of limitations, saying:

> "The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of

limitations, but *it is a condition precedent which must be performed before the right to bring an action on the bond accrues.* Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond."

With the law as it then stood with these decisions of the Supreme Court of Minnesota in force, "Revised Laws, 1905" of Minnesota was enacted, and Chapter 354 of the Laws of 1895 with the amending statutes were all codified and written in Sections 4535 to 4539, inclusive, and the original statutes repealed.

The Minnesota statutes concerning school districts no where give any authority to a school district to make a contract or accept or receive a bond for the benefit of a third person. (Revised Laws, 1905, ch. 14.)

But for the general statutes above referred to, the bond in question would have given no right of action to the defendant in error under the decisions of the Minnesota Supreme Court in the *Breen* and *Sykes* cases above referred to. The right of recovery given by the bond in question to any person or corporation other than the school district was based wholly, at the time the bond was executed and delivered, upon the provisions of Sections 4535 to 4539 inclusive, "Revised Laws, 1905," of Minnesota.

Thereafter, while the law was in force requiring notice within ninety days after the furnishing of the last item of labor or material, with the construction of the Minnesota Supreme Court in the *Berrisford* case, that this provision was not a statute of limitations, but a condition precedent to a right of action, the bond in suit on October 17, 1908, was executed and delivered (Fol. 9).

The statute was thereafter amended by changing the time within which the notice should be given from ninety days after the furnishing of the last item of labor or material, to ninety days after completion of the contract and acceptance of the building. The ninety-day period in force when the bond was executed and delivered was definite, and based upon the last act of the person seeking to take advantage of the bond, while the time fixed by the amended law was wholly indefinite. The building might be completed in one year, five years or ten years after the time fixed for notice by the original law, or the building might never be completed and accepted, and the necessity for the notice under the amending law would therefore never arise.

The Decorating Company did not comply with the requirement for notice in force at the time the bond was executed and delivered. The Supreme Court of Minnesota held that the amending law was in force and effect, and extended to this bond executed and delivered before the amending law was passed.

This presents the only question involved, which is: Does Chapter 413 of the General Laws of Minnesota for 1909, if held to apply to the bond in question, impair the obligation of plaintiff in error's contract in the bond? If so, it is concededly void, and the action of the lower court erroneous.

ASSIGNMENT OF ERRORS.

1. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in overruling plaintiff in error's demurrer to defendant in error's complaint herein, which said demurrer was upon the ground that the facts stated in defendant in error's complaint do not constitute a cause of action in that

the notice therein alleged to have been served upon the plaintiff in error was not served as required by Section 4539, Revised Laws of Minnesota 1905, and that Chapter 413, General Laws of Minnesota for the year 1909, providing for notice at and within a different time than that provided for in said Section 4539, cannot apply to the bond and contract in question; that to apply it to the bond in question would impair the obligation of plaintiff in error's contract in violation of Section 10 of Article I of the Constitution of the United States.

2. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in holding in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the contract and bond in question in this action, and in holding that the application of said statute to the bond in question does not violate the obligation of the contract created by the execution and delivery of said bond, and in further holding that the application of said statute is not contrary to Section 10 of Article I of the Constitution of the United States.

3. The District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, erred in ordering judgment herein against plaintiff in error, National Surety Company, because said judgment is in violation of Section 10 of Article I of the Constitution of the United States.

4. The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court in and for the County of St. Louis, Eleventh Judicial District, State of Minnesota, for the aforesaid reasons.

5. The Supreme Court of the State of Minnesota erred in holding in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the

contract and bond in question in this action, and in holding that the application of said statute to the bond in question does not violate the obligation of the contract created by the execution and delivery of said bond, and in further holding that said statute, as applied to this case, is not contrary to Section 10 of Article I of the Constitution of the United States.

6. The Supreme Court of the State of Minnesota erred in holding in effect that the notice served upon plaintiff in error by defendant in error, under and pursuant to Chapter 413 of the General Laws of Minnesota for the year 1909, is sufficient, in that said holding is in effect that Chapter 413 of the General Laws of Minnesota for the year 1909 is applicable to the contract and bond in question, and that such application of said Chapter 413 impairs the obligation of the plaintiff in error's contract in violation of Section 10 of Article I of the Constitution of the United States.

ARGUMENT.

The contention of the plaintiff in error may be summarized in the following propositions:

I.

By the common law as interpreted by the Minnesota Supreme Court at the time the bond in question was given, no action could have been maintained by the Decorating Company against plaintiff in error on the bond sued on. The right of action given is statutory in its origin, and was conditioned on giving the proper notice.

II.

The statutes in force at the time the bond was executed and delivered, in so far at least as they conditioned the surety's liability, became a part of plaintiff in error's contract, including the requirement for notice therein, as fully in all respects as if such requirement for notice had been set out at length therein.

III.

The requirement for notice in the statute at the time the bond was executed and delivered became a part of the contract thereafter existing between the plaintiff in error and the Decorating Company, and was a condition precedent to liability and no part of the remedy.

IV.

The requirement for notice being a condition precedent to the right of action, and no part of the remedy, could not be dispensed with by any act of the legislature, and Chapter 413 of the Laws of 1909 dispensing with this notice, if applied to the bond in question, was unconstitutional as impairing the obligation of plaintiff in error's contract.

The only question is, whether or not it was within the power of the Minnesota Legislature, after the bond was executed and delivered, to change plaintiff in error's contract by dispensing with the requirement for notice within ninety days after the last item of labor or material was furnished.

If the action were one upon a liability created by common law and the requirement for notice a part of the remedy in enforcing the obligation assumed by the surety, then we would not contend that it could not within reasonable limits be changed by the subsequent act of the legislature.

If, however, the right of action in favor of the material man is statutory, and the requirement for notice a condition of liability, and not one step in the process of enforcing an existing liability, then by the settled decisions it was beyond the power of the legislature to change it.

The Supreme Court of Minnesota decided in the case of *Breen vs. Kelly*, in 1891, that such an action could not be maintained in the absence of a special statute giving the right. This decision was affirmed in the *Sykes* case in 1897, and again affirmed in the *Eidsvik* case in 1906.

In 1895 the Legislature of Minnesota first created this statutory right of action in favor of third persons under bond given to a public corporation. By the statute as first enacted, no notice by the third person as a condition to his right of action was necessary. The only requirement was that the action must be brought within one year after the cause of action accrues.

The legislature in 1897 added the requirement for the notice to a third person within ninety days after the last item of work or material, and that requirement was part of the law, and therefore a part of every bond executed and delivered under it until the enactment of Chapter 413 of the Laws of 1909, which was after the execution and delivery of the bond in question.

By the execution and delivery of the bond in question, plaintiff in error bound itself upon the conditions therein stated to indemnify the School District, and also to indemnify those furnishing labor and material, upon condition only that they give notice of their claim within ninety days after the furnishing of the last item of labor or material. The obligation of plaintiff in error as to third persons was not unconditional, but was conditioned upon three things:

(a) The furnishing of labor or material in carrying out the contract.

(b) Default of payment by the contractor.

(c) The giving of notice of the claim within ninety days after furnishing the last item of labor or material.

No cause of action arose unless and until all three of these conditions were complied with.

The plaintiff in error never made any other contract with the Decorating Company than that expressed by this bond, and this bond at all times must be read and construed as if it contained written in it as a proviso the language of the statute.

The bond as executed and delivered bound plaintiff in error to indemnify the School District, and to indemnify the third persons who brought themselves within the conditions of the bond, but it did not bind the Surety Company to indemnify any third person who did not bring him-

self within the conditions of the bond, the only measure of the surety's obligation.

By the contract so executed, any person seeking to avail himself of its benefits had imposed upon him the obligation as a condition precedent to any right of action in his favor to give the required notice. This was the obligation of the Decorating Company if it desired the benefit of the bond, and any statute attempting to dispense with this notice, or to change the time of giving it, entirely destroyed that part of the obligation of the Decorating Company.

Plaintiff in error, by its contract, agreed that upon the performance of certain conditions, among which was the giving of this notice, it would indemnify third persons, including the Decorating Company. Any attempt by the legislature to dispense with this condition precedent to plaintiff in error's liability would be making for it a new contract, and impairing the obligation of the contract in existence by changing its liability from conditional to absolute.

The notice required by the law in force at the time the bond was given was not served, but notice was served that would have been sufficient under Chapter 413 of the Laws of 1909.

The whole theory of the court in holding that the requirement for notice was a necessary step in the enforcement of the remedy and not a condition precedent to the right of action, overlooks the fact that the right of action in favor of third persons was not given by the common law but by the statute, and the same statute that gave the right conditioned it.

I.

By the common law as interpreted by the Minnesota Supreme Court at the time the bond in question was given, no action could have been maintained by the Decorating Company against plaintiff in error on the bond sued on. The right of action given is statutory in its origin, and was conditioned on giving the proper notice.

On July 26, 1888, O'Halloran, as principal, and Kelly and O'Toole, as sureties, executed and delivered to Hennepin County, Minnesota, a building contractor's bond. The contractor defaulted, and the material men brought an action upon this bond, and recovered judgment in the court below. This judgment was reversed by the Supreme Court upon the ground that Hennepin County, being a public corporation, had no common law power to take the bond or make a contract for the benefit of a third person. The bond provided that the principal and sureties:

> "Are held and firmly bound unto the County of Hennepin for the use of all persons who may do work or furnish materials pursuant to the contract"

describing it, and was conditioned that the principal should:

> "Save and secure the County of Hennepin harmless, and shall pay all just claims for all work done and to be done, and all materials furnished and to be furnished, pursuant to said contract and in the execution of the work therein provided for as they shall become due hereafter."

Plaintiff furnished material which was not paid for. The court said, speaking of the power of the county:

> "No power to take security for third persons, nor capacity to make contracts expressly for their benefit can be implied. To enable a municipal corporation to take such security or make such contracts, it must have direct authority from the legislature, the source of all its powers. No such power is granted to the County of Hennepin by the act authorizing the work mentioned in the bond; none is to be found in the general law granting powers to counties. The plaintiff can recover on the bond only as upon a contract made for his benefit between parties having legal capacity to make it, which was not the case with the obligee named in the bond."

This decision was affirmed and upheld by the Supreme Court of Minnesota in *Park Brothers & Company, vs. Sykes*, 67 Minn., 153, decided in 1897, upon a bond executed and delivered in 1894, before the statute authorizing such bonds was passed. In that case the bond was given to the Village of St. James. It was conditioned that the principal should:

> "Pay for all labor and materials employed in the construction thereof, and in all things perform his said contract."
> The court said:
>
> "It is contended by the defendant that the Village of St. James did not have the right or power to take the bond in question for the use or benefit of the plaintiffs, and the case of Breen vs. Kelly, 45 Minn., 352, is cited in support of this contention.
>
> We are of the opinion that this contention is well founded, and that the latter case controls the one at bar. There is no direct authority from the legislature conferring the power upon villages of less than three thousand inhabitants to take security for the benefit of third persons, even where the contract provides that work done or material furnished shall be for the benefit of the village itself, nor does there exist any implied authority upon the part of the Village of St. James to take such security. Its power or capacity in this respect is no greater than that of a county, and as we hold that the case of Breen vs. Kelly controls this one, an extended discussion of it is unnecessary."

In *Eidsvik vs. Foley*, 99 Minn., 468, decided December 14, 1906, the court held on a ditch contractor's bond given to Polk County, Minnesota, that it was specially authorized by the statute, and but for such statutory authority an action by a third person could not be maintained, saying:

> "This brings us to the last contention of the defendants which is, that if the bond can be construed to cover the plaintiffs' alleged cause of action it is

not, in that particular, a statutory bond, for the reason that the county was not authorized to take such a bond.

The caim must be conceded if the statute did not authorize the county to take such a bond. Breen vs. Kelly, 45 Minn., 352; Park Bros. & Co. vs. Sykes, 67 Minn., 153."

The court then discusses the statutes of the state, and holds that they specifically authorize the bond in question, and therefore the complaint states a cause of action.

It is therefore seen that by the decision of the Supreme Court of Minnesota laid down in the *Breen* case in 1891, affirmed in the *Sykes* case in 1897, and re-affirmed in the *Eidsvik* case in 1906, any obligation existing in favor of third persons, growing out of the bond executed by plaintiff in error, arose wholly by reason of the statutes of the state, and but for such statutes specifically authorizing such bond, no right of action would have arisen under said bond in favor of third persons, and, therefore, the right of action in favor of third persons being given by the statute was limited by the conditions imposed by the statute.

II.

The statutes in force at the time the bond was executed and delivered, in so far at least as they conditioned the surety's liability, became a part of plaintiff in error's contract, including the requirement for notice therein, as fully in all respects as if such requirement for notice had been set out at length therein.

The general principal that the law of the state where a contract is made and is to be carried out enters into and forms a part of it is elementary, and has received wide application. This rule of law is nowhere better settled than in the State of Minnesota.

In *Grant vs. Berrisford*, 94 Minn., 45, speaking of the provision for notice that is in quesion here, the Supreme Court of Minnesota in 1904 said that the requirement for

notice was a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits, concluding:

> "It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond."

In *United States vs. Quincy*, 4 *Wallace*, at 535, in discussing the question of impairment of obligation of contract, and the method of determining what the contract was, the court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

In *Walker vs. Whitehead*, 16 Wallace, 314, it is said:

> "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

In *Edwards vs. Kearzey*, 96 U. S., 595, this principle was applied in holding that a law which increased the

amount of property exempt from execution was invalid as to contracts theretofore made.

In *McCracken vs. Hayward*, 43 U. S., 608, the principle was applied in holding the statute of the state of Illinois, which prohibited the sale of property levied on under execution, unless it should bring two-thirds of its valuation, void as to contracts made before its passage.

In *Barnitz vs. Beverly*, 163 U. S., 118, it was held that a law authorizing the redemption of property sold upon the foreclosure of a mortgage where no right of redemption previously existed, and which extends the period of redemption beyond the time allowed when the mortgage was made, cannot constitutionally apply to a sale under a mortgage executed before its passage.

In *Bradley vs. Lightcap*, 195 U. S., 1, the principle was applied in favor of the mortgagee, in possession after condition broken, bidding in the property at foreclosure sale.

In *Harrison vs. Remington Paper Co.*, 140 Fed., 385, C. C. A., 1905, it was held that the statute of Kansas charging the remedy of creditors against the stockholders of an insolvent banking corporation was unconstitutional and void against contracts made and rights accrued before its passage. In the course of the discussion the court, by Sanborn, said:

> "The constitution, the statutes under which the corporation is organized, and the established rules of law in force when he becomes a stockholder are read into and become a part of his contract."

An almost unlimited number of illustrations might be given from the decided cases, but the question is so well settled, and has been so many times passed upon by this court, and the members of this court are so familiar with

the principle that the multiplication of illustrations is unnecessary.

Under the settled rule the contract and obligations of plaintiff in error are precisely the same as they would have been if there had been written into the bond as one of its conditions the language of the statute specifically requiring notice of the claim within ninety days after furnishing the last item of labor or material.

III.

The requirement for notice in the statute at the time the bond was executed and delivered became a part of the contract thereafter existing between the plaintiff in error and the Decorating Company, and was a condition precedent to liability and no part of the remedy.

This case was disposed of by the court below on the theory that the requirement for notice in the statute at the time the bond was executed pertained to the remedy and not to the right, and in so doing it disregarded without mention its previous decision where it had held squarely that the requirement for notice was a condition precedent to the right to sue, and not in the nature of a statute of limitations.

In creating statutory rights of action, legislatures have conditioned the right usually upon the time of bringing suit, and occasionally upon the giving of notice of the claim, as in the statute in question. In discussing these various statutes, the courts have uniformly treated the limitations and conditions contained in the statute conferring the right as limitations upon the right, and not upon the remedy.

The following from cases hereinafter cited more fully are illustrative:

With reference to time of bringing action:

In the *Harrisburg* case: "A condition attached to the right to sue at all."

In the *Lambert* case from West Virginia: "An essential element of the right to sue."

In the *Theroux* case: "A constituent part of the liability" and "of the right."

With reference to notice of claim:

In the *Berrisford* case from Minnesota, referring to the statute in force when the bond in suit was written: "It is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues."

In the *Simerson* case: "The liability" created by the statute and the "right to assert that liability were conditioned on the giving of the notice."

In the *Veginan* case from Massachusetts: "A condition precedent to the right to bring an action."

In the *Healey* case from Massachusetts: "The last circumstance necessary to the creation of such right . . . . a condition precedent to the right of action."

In the *McRae* case from Massachusetts: "A condition precedent to the right of action . . . one of the essential elements of the cause of action."

In the *Dolenty* case from Montana: "Of the essence of the right itself."

In the *Hudson* case: Not "a mere matter affecting the remedy" but "a part of the contract itself."

In the *Boomer* case: "A condition attached to the right to sue at all."

In the *Denver & Rio Grande* case: "A condition precedent to the right of action."

In the *Christie-Street Commission* case: "A condition precedent to the right of action."

It would seem to be conclusively settled by the authorities cited under the preceding numbers, that the common law, as interpreted by the Supreme Court in the State of Minnesota, gave no right of action on a contractor's bond given to a public corporation in favor of one who furnished labor or material; that such right of action was given wholly by the statutes, and that such statutes giving the right of action thereby became a part of the contract entered into by the surety in the bond as fully in all respects as if written out at length therein.

In *Grant* vs. *Berrisford*, 94 Minn., 45, decided in 1904, the Minnesota Supreme Court had under consideration an action brought by a material man upon a contractor's bond given in 1903 to the City of St. Paul pursuant to the provisions of its charter, for the benefit of all persons who might perform labor or furnish materials in the execution of the contract. The complaint did not allege compliance with the requirement of the general statute providing for notice of the claim within ninety days after furnishing the last item of labor or material. The charter of the City of St. Paul was adopted under a constitutional amendment allowing citizens to frame their own charters, such charters to:

> "Always be in harmony with and subject to the statute and laws of the State of Minnesota."

The charter contained provisions with reference to the doing of public work, letting of contracts, and giving of bonds, but had no requirement for notice of claim similar to that quoted from the general law. The argument was made that the provision for notice was in the nature of a statute of limitations, and affected the remedy and not the right, and that, therefore, it was not a proper subject

for a municipal charter, but was a proper subject for the general law. The court assumed that this contention was correct, and then proceeded to discuss the nature of the requirement for the notice of claim within ninety days after the last item of labor or material was furnished, which is in question in this matter, saying:

> "The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, *is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues.* Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. *It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond.*"

This case would seem to have settled the law so far as it could be settled that the requirement for notice was a part of the contract and its performance a condition precedent to the right to recover.

The rule is elementary, so far as we know, that where a right not existing at common law is given by statute, all of the conditions and limitations of the statute giving the right are conditions and limitations upon the right itself and not upon the remedy.

If a requirement for notice had been contained in a general statute of the State of Minnesota, and had applied to common law rights as such, it would, so long as no rights became vested under it, have been subject to revision, to amendment or repeal by the legislature of the state. Upon the other hand, conditions found in statutes creating a right of action not existing at common law, are conditions of the right and not of the remedy.

This proposition is capable of almost unlimited illustration from the decided cases. The trial of an action is to be governed by the law of the forum as to those matters which affect the remedy only, and by the law of the place where the contract was made and to be carried out as to those things which affect the substantial contract rights.

One of the most familiar illustrations is that of the statutes giving a right of action for death. This right did not exist at common law. Various states enacting these statutes applied different rules as to time within which action could be brought and limit of recovery, and it has been held, so far as we know, in every action where the question has arisen that the amount of recovery, requirement for the giving of notice, and time within which action may be brought, are all to be determined by the law of place where the death occurred, and not by the law of the forum.

If these provisions of the statute applied only to the remedy, then they would by familiar principals be determined by the law of the forum, but applying, as they are universally held to do, to the right itself, they are determined by the law of the place where the death occurred.

Statutes have been passed making public corporations, counties, cities and the like liable for injuries upon the streets, and for other results of negligence for which they are not liable at common law. These statutes have various requirements as to notice of injury and time within which action shall be brought, and all such requirements found in statutes giving a right of action unknown to the common law are held to apply to and be limitations upon and conditions of the right of action itself, and not to apply to the remedy, and in the trial of such an action, the law where the accident occurred and not the law of the forum as to these matters controls.

Statutes have been passed in various jurisdictions, as in the state of Minnesota, giving the right to laborers and material men to recover on building contractors' bonds given to public corporations, and they have in every case we have discovered, except the one from which this writ of error is taken, been held to condition the right and not apply to the remedy.

In *The Harrisburg*, 119 U. S., 199, the action was sought to be maintained in admiralty after the time fixed by the law of the state where the death occurred. In this case the court by Chief Justice Waite said:

> "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is *a condition attached to the right to sue at all.*"

In *Selma R. & D. R. Co. vs. Lacey*, 49 Ga., 106, the death occurred outside the state of Georgia. The action was brought in Georgia after the time when it could have been maintained where the death occurred, and the court held the action would not lie.

In *Hamilton vs. Hannibel & St. J. R. Co.*, 39 Kan., 56, 18 Pac., 57, the death occurred in Missouri, and it was held that an action could not be maintained in Kansas within the time fixed by the Kansas statute but after the time fixed by the statutes of Missouri.

In *Boyd vs. Clark*, 8 Fed., 849, Judge, afterwards Justice, Brown in denying the right of action for death in the federal court of Michigan after the time fixed by the Ontario statute where the death occurred, said:

> "The true rule I conceive to be this, that where a statute gives a right of action unknown to the common law, and either in a proviso to the section con-

ferring the right, or in a separate section limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

In *Lambert vs. Ensign Co.*, 42 W. Virginia, 813 (26 S. E., 431), that court in discussing the West Virginia statute giving the right to sue for death which concluded:

"Provided that every such action shall be commenced within two years after the death of such deceased person,"

Said:

"The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore strictly speaking it is not a statute of limitation."

In *Theroux vs. N. P. Ry. Co.*, 64 Fed., 84 (C. C. A 8th Circuit, 1894), the court held that an action might be maintained in Minnesota for a death occurring in Montana after the time limit in Minnesota, and within the time limit in Montana, and the case of *Babcock vs. N. P. Ry. Co.*, 154 U. S., 190, held the converse in substance in upholding a recovery in Minnesota for an amount of damages allowed by the law of Montana where the death occurred, but not allowed at the time of the death by the law of Minnesota where the action was tried.

In the *Theroux case*, in pointing out that the statutes of Montana where the death occurred, and not of Minnesota where the trial was held, controlled, the court said:

"It must be accepted, therefore, as the established doctrine, that where a statute confers a new right

> which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a *constituent part of the liability intended to be created*, and *of the right intended to be conferred*. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy."

In *Slater vs. Mexican National R. R. Co.*, 194 U. S. 120, it was held that an action could not be maintained in the United States to recover on a death claim originating in Mexico, for the reason that the Mexican law required a decree providing for periodical payments, and subject to modification from time to time, and the common law court was held to have no power to render such a decree. In the course of the opinon at Page 126 it is said:

> "As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent."

In *Simerson vs. St. Louis & S. F. R. Co.*, 173 Fed., 612, (C. C. A. 8th Circuit, 1909), the court considered the effect of the general statutes of Kansas making a railroad company responsible for the negligence of fellow-servants:

> "Provided that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

The court held that the statute created a new liability, and that the requirement for notice was an essential condition precedent to the right to maintain an action, and said:

"These enactments, therefore, in so far as railroad companies and their employes are concerned, created a new liability, and conferred a new right before then unrecognized in that state. The Legislature, which created the liability and conferred the right, could of course, determine and fix their bounds and subject them to conditions. If it saw fit to impose a condition or limitation upon the incurrence of the liability or the enjoyment of the right, it rested exclusively in its sovereign will to do so. * * * * * It seems to us very plain that the *liability* created by the Kansas statute in force when Simerson was killed, and the *right to assert that liability, were conditioned upon the giving of the notice* specified in the statute." And further:

"By the plain language of the statute the giving of the notice is as necessary an element of the creation of liability as the negligence of the fellow-servant itself is. The proof of the one is, therefore, as indispensible to constitute a cause of action as the proof of the other."

This ruling was upheld by the same court in *Pohlman vs. Railway Co.*, 182 Fed., 492, in which it was held that plaintiff having failed to show the giving of this notice, defendant was entitled to an instructed verdict at the close of the testimony.

In *Lange vs. Railway Co.*, 126 Fed., 338 (C. C. A. 8th Circuit, 1903), the court considered the effect of the Colorado statute requiring notice of injury where damage was claimed by reason of the negligence of a co-employe in charge of a train. The court held there could be no recovery without proof of the notice, and said:

"Upon the record, the failure of Lange to give the notice required by the Act of 1893 is admitted. Such failure is fatal to his case. The enforcement of the liability of the company was, by the act which created it, conditioned upon the giving of the notice."

The rule that requirement for notice contained in the statute creating the right is a condition precedent to the right is established in a line of Massachusetts cases. In *Veginan vs. Morse*, 160 Mass., 143, Judge, now Justice, Holmes, delivering the opinion of the court held, following prior decisions, that the requirement of notice was a condition precedent to the right of action, and must be made to affirmatively appear by the plaintiff in his case. This case has been followed in many decisions in Massachusetts and elsewhere.

In Healey vs. Geo. F. Blake Mfg. Co., 180 Mass., 270 (62 N. E., 270), the court had under consideration a Massachusetts statute which provides that:

> "No action for the recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place and cause of the injury is given to the employer within thirty days,"

from the accident causing the injury. The court held, citing the *Veginan* case, that this notice was not a process, and was not in the nature of the statute of limitations, and was not part of the remedy, but was a condition precedent to the right of action, saying:

> "This notice * * * * is a condition precedent to the right of action. It is not simply one of the steps in enforcing a right of action already existing, but *is the last circumstance necessary to the creation of such right. The liability is not complete until the notice is given.* Being *a condition precedent to the right of action*, it must precede the writ."

In *McRae vs. Railway Co.*, 199 Mass., 418 (85 N. E. 425), it was held, construing an employer's liability act of Massachusetts, that the requirement for notice therein contained was a condition precedent to plaintiff's right of

action, and not a limitation affecting the remedy only, the court saying:

> "It has been settled that the clause relating to the notice is *a condition precedent to the right of action, or in other words, that the giving of the notice is one of the essential elements of the cause of action*, and that where the declaration fails to allege the proper notice, the question can be raised by a demurrer" citing the Veginan case.

And further, speaking of the limitation of time within which an action might be brought:

> "The right of action is created by the statute, and is maintainable solely by its authority. In view of these considerations we think that the same rule must be applied to the second condition as to the first, and that this limitation of time must be regarded, not merely as a statute of limitation, but as one of the conditions of a right of action. It forms one of two conditions, each of which is essential to the right of action. The right must be accepted and pursued under the conditions affixed to it."

In *Dolenty vs. Broadwater*, (*Montana*), (122 Pac., 191), the action was to recover a tax paid in protest. The statute required certain conditions to be complied with, and that the action be brought within a certain time. The court held that the time requirement for the action was not a statute of limitation, but the right of action was a conditional one, and that a full compiance with the statute was a condition precedent to the right to maintain an action, and said:

> "The rule is well settled in this country that whenever a statute grants a right which did not exist at common law, and prescribes the time within which the right must be exercised, the limitation thus im-

> posed does not affect the remedy merely, but *is of the essence of the right itself*, and one who seeks to enforce such right must show affirmatively that he has brought his action within the time fixed by the statute, and if he fails in this regard he fails to disclose any right to relief under the statute."

This general principle that the conditions contained in the statute limit the right of recovery, and do not apply to the remedy, has been often held with reference to bonds of various kinds.

In *Hudson vs. Bishop*, 32 Fed., 519, the court considered the effect of a statutory probate bond in Wisconsin which required an action to be brought against the sureties within four years from the time when the guardian shall have been discharged. The action was brought in Iowa, and it was held that the Wisconsin statute applied. The court said:

> "When the Legislature of Wisconsin provided for the giving of a bond by guardian, it had a right to enact and declare the duties and obligations imposed thereunder upon the sureties signing the same. The extent of the liability thereby imposed is to be determined by the statute of Wisconsin, no matter in what forum suit may be brought thereon. When the statute in express terms declares that, as against the sureties, no action can be maintained unless brought within four years after the discharge of the guardian, this defines the extent of the liability of the surety. It *cannot be treated as a mere matter affecting the remedy* upon the contract of suretyship, but it is *a part of the contract itself*."

The case was reheard, Justice Brewer sitting with District Judge Shiras who rendered the first opinion. Justice Brewer's opinion appears in *Hudson vs. Bishop*, 35 Fed., 820.

In *United States vs. Winkler*, 162 Fed., 397, it was held that no liability existed in favor of persons furnish-

ing material under a bond given to the United States, except in the manner provided by statute, and that the legislature could not, by changing that statute, add to the surety's liability. It was there said, page 402:

> "The bond and statute are to be read together. While the bond is intended for the benefit of both the United States and persons furnishing material, etc., the remedy of the latter is in the cases and in the way prescribed. The courts cannot change the statute or add to the liability of the surety. The surety contracted with reference to the statute and cannot be sued on its bond by a person who furnished material to the contractor, except in the cases and on the conditions and on the happening of the events named."

U. S. vs. Roomer, 183 Fed., 726 (C. C. A. 8th Circuit, 1910), was an action upon a building contractor's bond given to the United States under the act of February 24, 1905, Chapter 778, 33 Stat., 811 (U. S. App. Stat., 1909, P. 948). The statute authorized a person furnishing material or labor and being unpaid therefor to bring an action in the name of the United States for his use and benefit:

> "Provided that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later."

The action was not brought within the time fixed by the act. An action was brought within that time and dismissed by the state court, and another action brought within less than six months thereafter. The Colorado statutes provided in substance that where an action was brought within the time fixed by the statute and dismissed for certain reasons, a new action for the same cause might be brought within one year thereafter.

In disposing of this contention the court said:

> "We are also of the opinion that the limitation prescribed by Chapter 778, 33 Statutes, 811, is not merely a limitation on the remedy, but on the liability itself. The statute created a new legal liability with a right to a suit for its enforcement, provided the suit was brought within one year after the performance and final settlement of the contract, and not later. The time within which the suit must be brought operates as a limitation of the liability itself, and not of the remedy alone. *It is a condition attached to the right to sue at all.* Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is therefore to be treated as a limitation of the right."

In most of the cases the question has arisen in some manner as to whether the requirement for notice or the limitation of time for bringing action is a limitation upon the right or upon the remedy. If upon the right, then it followed the cause of acton wherever it might be asserted. If upon the remedy, then it would not be affected except by the provisions of the law of the forum.

In a few cases attempts have been made to repeal or amend or modify the law, and in every one of those cases to which our attention has been called, except the one at bar, it has been held that such a law was inapplicable to the contract or obligation theretofore existing.

One of the earliest cases is that of *Railway Co. vs. Hine*, 25 Ohio State, 629. The court considered the effect of the repeal of the limitation statute in an action for death. The statutes of 1851 gave a right of action for death provided "that any such action shall be commenced within two years after the death of such deceased person." Plaintiff's intestate was killed in 1870. In 1872, before two years had expired, the statute was amended and the

proviso withdrawn. The action was brought in 1873. It was held there could be no recovery for the reason that the two-year limitation was a condition precedent to the right to maintain the action and was not a mere statute of limitations. The court said:

> "In creating or giving the right by this act, it was within the power of the legislature to impose upon it such restrictions as were thought fit; and if restrictions were imposed, they must be referred to the newly created right itself, if the restrictive language used will warrant it; for the act being in derogation of the common law, any restrictive language used in it must be construed against the right created by it."

In *Denver & Rio Grande vs. Wagner*, 167 Fed., 75 (C. C. A. 8th Circuit, 1908), the court considered the effect of the laws of New Mexico requiring notice to defendant of injuries to persons claiming damages for death. The original statute was enacted by the Territory of New Mexico, and thereafter, after the death of plaintiff out of which the action arose, the act was disapproved by Congress. On motion for rehearing, it was contended that by reason of this disapproval the necessity for the notice was dispensed with. The court disposed of this argument, saying:

> "Counsel's whole argument in support of the motion for rehearing is based upon a false premise, to-wit: That the provision of the amendatory act of 1903, requiring the giving of notice within 90 days after the injury, pertains merely to matter of procedure, and was in the nature of a statute of limitation on the right of action; and, therefore, when the statute was disapproved by Congress, it was like a repealing act affecting the remedy, passed while the case is on appeal and before final judgment thereon, either destroying the right of appeal or removing the bar. The Legislature of New Mexico gave to the defendant in error a right of action for damages resulting from

death—a right which did not exist at common law. The Legislature which gave that right, by the act of 1903, declared that it could be exercised only on the condition that within 90 days after the given cause of action arose, the plaintiff should give the specified notice. *This was a condition precedent to the right of action*, the non-performance of which took away the cause of action. When this injury occurred, and this suit was brought, the act of 1903 was a valid law, in force and effect. Under it, when this suit was brought, the plaintiff had no cause of action, as she had not performed the condition precedent."

In *Christie-Street Commission Co. vs. U. S.*, 126 Fed., 991, at 996, discussing the right to maintain an action to recover taxes paid, the court said:

"Where a right of action does not exist at common law, but is given by virtue of an enabling statute wherein there is a specified limitation on the right to sue, such limitation becomes an integral part of the cause of action, and after the lapse of the prescribed period the right of action is at an end. The prescribed period is *a condition precedent to the right of action*, and is not a mere limitation on the remedy."

IV.

The requirement for notice being a condition precedent to the right of action, and no part of the remedy, could not be dispensed with by any act of the legislature, and Chapter 413 of the Laws of 1909 dispensing with this notice, if applied to the bond in question, was unconstitutional as impairing the obligation of plaintiff in error's contract.

The contract signed by plaintiff in error, reading into it the statute of Minnesota as then in force, might be summarized as follows:

KNOW ALL MEN BY THESE PRESENTS, That Henry C. Henricksen as principal, and National Surety Company as surety, are bound unto School District No. 39, St. Louis County, Minnesota, in the

sum of Fifty-eight Thousand Three Hundred Dollars ($58,300.00), to the prompt payment of which we bind ourselves by these presents.

The condition of this obligation is such that, whereas Henricksen on October 8, 1908, entered into a contract with the School District, a copy of which is attached and made a part thereof;

NOW, THEREFORE, if Henricksen shall pay as they become due all just claims for work, and materials furnished for the completion of said contract, and complete said contract in accordance with its terms, then this obligation shall be void, otherwise in full force and effect.

This bond is for the use of said School District, and of all persons doing work or furnishing materials for the purpose of said contract *who shall, within ninety days after furnishing the last item of work or material, serve notice* upon the surety, specifying the nature and amount of his claim, and bring his action within one year after the cause of action accrues.

Plaintiff in error never gave any other bond in this matter, and assumed no contract relations with the Decorating Company not stated in its bond as summarized above.

On April 22, 1909, Chapter 413 of the Laws of Minnesota for 1909 was approved so as to call for the notice of claim within ninety days after the completion of the contract and acceptance of the building, and the bringing of the action within "one year after the service of such notice."

All bonds for public work in Minnesota, entered into after April 22, 1909, had written into them by the statute then in force the provision that they were made for the

benefit of the laborers and material men who gave notice of their claim within ninety days after the completion and acceptance of the building, and brought their action within one year after giving the notice.

By the above acts of the legislature the notice of claim has been deemed to be important and of value to the surety. No bond is required to enable either the public corporation or those furnishing labor or material to bring action against the contractor. He does not by the bond increase his obligation, which is to carry out the contract and to pay for the labor and materials. The only purpose, therefore, of requiring notice to be given is the protection of the surety.

By the contract which plaintiff in error made, reading the statute into it as we must, it was obligated to such third persons only as gave it notice of their claim within ninety days after furnishing the last item of labor or material. This definitely fixed the limit of time during which third persons might come in, and by notice bring themselves under the protection of the bond. It measured in that way the liability of the surety. The surety was liable to no person on account of labor or material who did not give this notice within this time, and bring the action within one year's time from the accrual of the cause of action.

This was the surety's contract, and it has a perfect right to insist that it shall be bound by no other. It received a premium for entering into this contract, and not some other, and it is conceded upon the record that the Decorating Company did not bring itself within this contract.

Contracts made since the amended law has been in force increased the class of persons to which the surety

might be liable, and increased the class of claims for which it became responsible.

By contracts made before the law was amended the surety's liability extended only to those claims of which it had notice within ninety days after the last item was furnished, and upon which action was brought within one year after the cause of action arose. By the contracts made after the amendment, the surety's liability extends to all persons and claims to which it would have extended under a contract made before the amendment, and in addition thereto to those claims of which it received notice after the time fixed in the original law, and prior to ninety days after the completion and acceptance of the building, and upon which action was brought within one year after the completion and acceptance of the building.

To apply the amended statute to bonds executed before its enactment is by legislative fiat to add to the liability of the surety all of those claims of which it may receive notice after the time fixed by the former law, and within the time fixed by the amendment, and to extend the time within which such actions may be brought from one year after the cause arises to one year after the building is completed and accepted.

The very fact that this amendment in the law was made by the legislature by separate enactment shows that it was considered by the legislature to be of importance. It is of no possible importance and of no possible value except as extending the liability of the surety in favor of persons and claims not covered by bonds executed under the law as in force prior to the amendment.

That this class of claims to which this liability was extended might be very large, is apparent upon the most

casual consideration. That the time during which the surety would be under an unascertained liability might be greatly extended, is also apparent. Under the law in force at the time this bond was executed, the man who built the foundation of the house must give notice of his claim within ninety days after it was finished if he desired to bring himself within the class covered by the bond. By the amended law, if the building were not completed for five years, he could postpone this notice for five years, and bring his action within one year thereafter; and if the building were never finished or never completed, and never accepted, the necessity for his giving notice at all would never arise, and the time fixed for bringing the action by the amended statute would never elapse, and unless the action were barred by some other general statute of limitations, there would be an indefinite, undefined liability of the surety for an unlimited time.

It ought to be clear that the surety having made its contract, assuming the liability which, as to third persons, would become fixed and definite, and upon which an action must be brought within a limited time, could not without its consent have this contract changed to one where its indefinite, undetermined liability extends or may extend for an unlimited time.

To attempt to apply the amended law to this bond is as much a change of the surety's contract and an impairment of its obligation, as would be the case if the contract by express language authorized by statute had stated that it did not create any liability in favor of the Decorating Company against the surety, and thereafter the legislature by express enactment had said that notwithstanding this express language of the contract it should be held to give a cause of action to the Decorating Company against the surety.

It is elementary law that the obligation of the surety cannot be extended or increased or varied without its consent.

Miller vs. Stewart, 9 Wheat., 680, is a leading case on this principle. It was there said by Mr. Justice Storey:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract, to the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. * * * He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and the variation is made, it is fatal."

This case has been followed and this principle applied by this court in many decisions. A recent one, *U. S. vs. Freel*, 186 U. S., 309, applied it to a contractor's bond where the location of the dry dock and the amount of work to be done in building it was changed without the surety's consent. The court said in that case, after quoting with approval from the case of *Miller vs. Stewart*, and referring to other cases in this court, that:

> "The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such a contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it."

Among the many cases citing and applying, the case of *Miller vs. Stewart*, are cases in a number of states holding that a modification by law of the obligation of the

surety is invalid. Among such cases, and illustrating others, are:

Governor vs. Lagow, 43 Ill., 141, held sureties to bond by assignees in liquidation of a bank not liable after the four years allowed by law for the liquidation, although in the interim an act was passed extending the time.

People vs. Tompkins, 74 Ill., 487, holding sureties to grain inspector's bond not liable for moneys collected by him for inspection where the duty of collecting such money was not imposed upon him before the execution of the bond.

Grocer's Bank vs. Kingman, 16 Gray, 476, holding sureties to cashier's bond discharged by subsequent increase of bank's capital stock.

Schuster vs. Weiss, 114 Mo., 171, holding sureties to appeal bond discharged by an alteration in the law governing appeals.

King County vs. Ferry, 5 Washington, 554 (32 Pac., 544), holding sureties on an official bond not liable for official's acts during an extension of the original term effected by the legislature since the giving of the bond.

It is clear that the change made by the act of the legislature in this case had the effect of extending the surety's liability to a class not covered by the bond with the law in force at the time it was written.

In *Green vs. Biddle*, 21 U. S., 1, (8 Wheat., at P. 84) it is said:

> "The objection to a law on the ground of its impairing the obligation of the contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance

which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In *Bank vs. Sharp*, 47 U. S., at Page 326, it is said:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

The act of the legislature in this case postponed the time of performance of the condition precedent by the Decorating Company if it desired to become a party to the bond from a period ninety days after the furnishing of the last item to a period ninety days after the completion and acceptance of the building, a date which might never arrive. It is too clear for argument that this condition of the surety's liability was of value to it, and that it could not be removed or the time of performance changed without its consent. It extended the liability of the surety to a class of persons and claims not included in its original contract.

This, if applied to the bond in suit, clearly made it of less value and impaired its obligation both by increasing the liability of the surety, and by postponing the time within which the Decorating Company must perform a condition precedent to its right of action.

It is thoroughly established, as shown by the cases heretofore cited, that the requirement for notice was a condition precedent to the right of action, the performance of which was the condition of any liability, and the

attempt of the legislature by the law as construed by the Supreme Court to dispense with the performance of this condition entirely in all cases where the building might not ever be completed or accepted, and to postpone it indefinitely in all other cases, must necessarily impair the obligation of plaintiff in error's contract. The law as it stood when the contract was made required third persons to give this notice as a condition to their having any right under the bond. The act of the legislature, attempting to dispense with the necessity for this notice, clearly impairs the obligation of this contract.

In *Golden vs. Prince*, 10 Fed. Cases, 544, Justice Washington in discusing this general question said:

> "What is the obligation of a contract? It is to do or not to do a certain thing, and this may be either absolutely or under some condition, immediately or at some future time. A law, therefore, which authorizes the discharge of a contract by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation by substituting for the contract of the parties one which they never entered into, and to the performance of which they, of course, had never consented."

Plaintiff in error never consented to be bound to indemnify any material man who did not give notice of his claim within ninety days after furnishing the last item. The legislature, in attempting to bind the Surety Company under those conditions, attempted to make a contract for it and impose upon it a liability it had not assumed.

In *Louisiana vs. New Orleans*, 102 U. S., 203, Justice Field said:

"The obligation of a contract in the constitutional sense is the means provided by law, by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means, impairs the obligation."

By the contract which plaintiff in error made, it was under no obligation to indemnify any person who did not give it notice as therein required. The legislature, by attempting to impose such liability where the notice was not given, or not given until a different time, impaired its obligation.

IN CONCLUSION.

The obligation which the Surety Company assumed by its execution and delivery of the bond was that measured by the statute in force at the time. It had no contract relation with the Decorating Company, except as that Company came within the conditions of the bond which the plaintiff in error had signed. It never brought itself within those conditions. The Supreme Court of the State of Minnesota had, by a series of decisions, established the doctrine that a bond in favor of a laborer or material man could not be taken by a public corporation. The legislature then passed an act authorizing such bonds to be taken, and gave the benefit thereof to such persons and such only as furnished labor or material and were not paid, and gave the necessary notice of their claim. The Supreme Court of Minnesota held squarely in a case where this was the deciding point that this requirement for notice was a condition of the right of action, and was not in the nature of a statute of limitations; holding, necessarily by inference, that it could not be charged by the legislature so as to affect contracts heretofore made. While the law and statutes were in this condition, the

bond in question was executed, the legislature thereafter attempted to change the requirement for notice by postponing it to a time which would usually be later and might never arrive, and the Supreme Court of Minnesota, in the judgment from which this writ of error is taken, held that this statute applied and did not impair the obligation of the bond theretofore executed.

By the preceding brief, we trust that we have demonstrated that the requirement for notice in the statute was a condition precedent to the right of action, and beyond the reach of the legislature as to contracts in force.

We therefore respectfully submit that Chapter 413 of the Laws of 1909 impaired the obligation of the contract of the Bonding Company thereafter entered into, and that the Judgment of the Supreme Court of Minnesota should be reversed, with instructions to reverse the judgment of the trial court and enter judgment in favor of the defendant.

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SUBJECT INDEX.

Cases Cited:

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM A. D. 1912

NATIONAL SURETY COMPANY,
PLAINTIFF IN ERROR

vs.

ARCHITECTURAL DECORATING COMPANY,
DEFENDANT IN ERROR

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF FACTS.

This was an action brought by defendant in error to recover damages for breach of a bond of plaintiff in error National Surety Company in the payment of a claim for labor and material furnished for a public high school building. The facts as found by the trial court, are, that on October

8th, 1908, defendant Henricksen entered into a contract with the School District No. 39, for the erection of a high school building at Eveleth, and in order to give the same validity, Henricksen as principal and plaintiff in error National Surety Company as surety, on or about October 17th, 1908, made and delivered to said School District for the use of all persons doing work or furnishing skill and materials, a bond for the payment of all claims for such labor or material. The defendant Henricksen entered upon performance of said contract, and between July 16th, 1909, and August 16th, 1909, the defendant in error under a contract with Henricksen, furnished labor and material for the high school building which was used therein, of the value of One thousand and fifty dollars, ($1,050.00), no part of which had been paid. Default was made by Henricksen in the payment of said claim, and at the time of the commencement of this action, said Henricksen had not completed the contract for erection of the high school building and the same was not as yet accepted by the School District. Prior to the institution of this action, defendant in error on March 8th, 1910, served a written notice on plaintiff in error and a like notice on Henricksen, specifying the nature and amount of

its claim and the date of furnishing last item thereof as required by Chapter 413 of Laws of Minnesota, 1909, and thereupon this action was brought to enforce said claim of defendant in error against the Surety on said bond, resulting in judgment for defendant in error. (Findings pp. 21 to 23 Record) which on appeal to Supreme Court of Minnesota was affirmed. (Record pp. 33 to 35) and is here for review on writ of error to that Court.

The bond involved in this action was given under the provisions of Section 4535 Revised Laws Minnesota 1905, which reads as follows:

> "Sec. 4535. No contract with the state, or with any municipal corporation, or other public board or body thereof, for the doing of any public work, shall be valid for any purpose, unless the contractor shall give bond to the state or other body contracted with, for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified, and for compliance with the laws appertaining thereto. The penalty of such bond shall be not less than the contract price."

By Section 4537, of the same laws, "any person entitled to protection under said bond, may maintain an action thereon for the amount due him" and by a subsequent Section 4539, it is provided

> "Sec. 4539. No action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

Such was the statute law in force at the time when the bond in question was delivered. Subsequently and in April 1909, but before defendant in error had any contract for or performed, any labor, or furnished any material, under the bond in question, the legislature of the state enacted a statute known as Chapter 413 Laws 1909, which took effect April 22nd, 1909, amending Section 4539, so as to read as follows:

> *"Limit of time to bring action.*—Section 1. That section four thousand five hundred and

thirty-nine (4539) of the Revised Laws of Minnesota, 1905, be and the same is hereby amended so as to read as follows.

4539. Limit of time to bring action—No action shall be maintained on any such bond unless within ninety days after the completion of the contract and acceptance of the building by the proper public authorities, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice.

Section 2. This act shall take effect and be in force from and after its passage.

Approved April 22, 1909."

It thus appears, that while the bond in question was delivered in October 1908, and prior to the enactment of Chapter 413, Laws 1909, which took effect April 22nd, 1909, yet the defendant's in error claim for labor and material under said bond, did not arise until the 16th day of July, 1909, when the first item of such labor and material was furnished (Findings pp. 21-23). In other words, when defendant in error entered into the contract with Henricksen and performed labor and furnished the material for which this action is brought, the only statute in force regulating the rights of action in such cases, and which alone ap-

plied to defendant's in error cause of action, was Chapter 413 of General Laws 1909, above fully set forth.

It is admitted that the notice to the Surety as required by that statute was duly given by defendant in error in time, to-wit, within ninety days after the completion of the contract and acceptance of the building (Findings pp. 21-23) but plaintiff in error contends, that inasmuch as the former statute in force when the bond was given, required the notice to be given within ninety days after the furnishing of last item of labor, the notice here in question, while otherwise sufficient, was given too late, it being claimed that the notice should have been given under the old law.

It is conceded that the amended statute by its terms makes no exception as to bonds executed prior to its passage, but the contention here is, that to apply it to a bond given prior to its enactment, as was done in this case, would be to impair the obligation of the contract of the Surety Company, in violation of the federal Constitution.

The sole question therefore is whether, assuming said Chapter 413 to apply to bonds executed prior to its passage, the statute in question is in

violation of the constitutional provision referred to.

The contention that to so apply the statute, is an impairment of the obligation of Surety's contract, is based upon the propositions, that the law in force at the time the bond was executed became and is a part of the bond the same as if its terms were written in the bond itself; that the former statute is and was a substantial part of the obligation assumed by the Surety, and that subsequent change in the statute is in effect an impairment of its obligation within the meaning of the federal constitution.

The question of impairment was first raised by plaintiff in error upon a demurrer to the complaint and after an elaborate argument, the trial Court decided that the amended statute was one merely regulating remedy without impairing the obligation. (See memorandum of Judge Cant pp. 13 to 15 Record).

Upon appeal to Supreme Court of Minnesota, it was again squarely decided by unanimous opinion of that Court that the amended statute was one affecting remedy only and did not impair the obligation. (Opinion pp. 33 to 35—reported 115 Minn. 382.)

ARGUMENT AND POINTS.

I.

Chapter 413 Laws 1909 Is a Law Regulating Remedy Only.

It is of course conceded, that if the offending statute is one merely regulating remedy without affecting the obligation of the Surety under the bond, then there is no impairment of the obligation within the meaning of the constitutional provision. The question here is therefore narrowed to this:

Is the statute one merely regulating a remedy for the enforcement of a right under the bond or is it one, which while professing to act on the remedy only, does in fact so affect the obligation of the Surety, as to impair it?

In discussing this question it is proper to bear in mind the following principles which are fundamental:—

First: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, exists in the nature of things. Without impairing the obliga-

tion of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

Sturges vs. Crowenshield, (per J. Marshall) 4 Wheat. 122.

Second: The legislation to be objectionable under that clause "must affect the contract *directly* and not *incidentally,* or only by *consequence.*

Van Hoffman vs. Quincy. 4 Wall. 553.

Oshkosh vs. Oshkosh 109 Wis. 208.

(Same case affirmed in 187 U. S. 437)

Third: Over mere remedies the power of the legislature is absolute; laws regulating remedies involve so much the consideration of public convenience and welfare, that individuals cannot be conceded vested rights therein.

Bernheime vs. Converse 206 U. S. 516.

The fallacy of counsel's contention lies in the confusion of the "obligation of a contract" and the "remedy to enforce it," and their whole argument is based upon the erroneous assumption that in this case the "remedy to enforce" is a material part of the "obligation of the contract."

Before it can be said that a law impairs an

obligation of a contract it is first most pertinent to inquire, what is the contract and what is the obligation claimed to be impaired?

What then is the true meaning of the contract in question?

The express undertaking of the Surety in the bond in question is "if the said Henry C. Henricksen shall pay as they *become due,* all just claims for work, material, etc., * * * then this obligation shall be void, but otherwise of full force and effect." (pp. 5-6 Record).

The contract of the Surety is "to pay all just claims as they become due" without any conditions or limitations whatsoever, except the default of the contractor. That is the essence of its promise and therefore the essence of its obligation under the language of the bond.

The substantive rights and duties (as distinguished from the remedial rights) which came into existence under this bond, as soon as default was made by the contractor, were, that the defendant in error had a right to receive from the Surety, the amount of its claim, and it became the Surety's duty, as evidenced by its express promise, to pay the amount of such claim.

This right to demand and receive the pay-

ment of a just claim, and the duty to pay it, are the substantive rights and duties; they of necessity exist and are fully formed, if the language of the bond is to control, without appeal to and independent of the ninety days' notice under the statute, which provides for their enforcement.

The change in the character of notice under the statute which it is claimed impairs the obligation of the bond, cannot possibly enter into the question of the correct analysis of the *substantive* rights and duties of the parties under the contract, since the promise "to pay when due" is in no way made dependent upon a previous notice or any other condition whatever.

It is only in the event of Surety's breach of its express obligation to pay, that the statute in question comes into operation and gives rise to a new right, for the enforcement of the obligation, which is purely a *remedial* right. This distinction between the substantive rights and duties (arising from the express contract of the parties) and the *remedial* rights and duties (which the state grants and imposes) is obvious and important here, and will be found clearly illustrated in Pomeroy's Remedies and Remedial rights in Sections 1 and 2 of his work.

In order to invoke the protection of the Constitution, as is sought here, it is not enough for the plaintiff in error to show an impairment of its *remedial* rights, but it must further satisfy the Court that its *substantive* rights have been actually and directly affected by the offending statute.

In what way, if any. does the amended statute affect the obligation of this bond? The language of the statute is as follows:—

> "No action shall be maintained on any such bond unless, within ninety days after the completion of the contract and acceptance of the building by the proper public authorities, the plaintiff shall serve upon the principal and his sureties a written notice specifying nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice."

Upon its face and by its express language, it merely provides the methods for the enforcement of a contract; in other words, it merely regulates the *remedy;* it does not expressly or directly affect the obligation of the bond; it neither increases the liability of the Surety, nor advances the time of payment.

A default in the payment of a just claim when due by the contractor, gave the defendant in error

right to demand of the Surety the money and a corresponding obligation on its part to pay; *that is the essence of the obligation.* In what manner that demand may be enforced by law is not a condition precedent of its obligation, but a condition of the remedy for its enforcement. But the moment you speak of means of enforcement of a substantive right, you at once enter into the domain of remedial rights, over which the power of the State is supreme, and which do not fall within the prohibitory clause. Admitting for sake of argument that the ninety days' notice of the Surety is a valuable right, (which the Minnesota Court in Lakeside vs. Surety Co. 105 Minn. 213, says it is not, even when made a condition of the promise, in the absence of showing of damage), the question still remains whether the right is a *substantive* or *remedial one;* for if it is merely the latter, it is not as already noticed, protected by the constitution.

In the view that the ninety day's notice is a condition of the obligation, there can be no interim of time between the breach of the Surety's promise to pay the claims as they become due, and giving of the notice to it, at which there could be any subsisting promise on its part to pay. But

under such construction what becomes of the express promise to pay "all just claims as they become due?" The words "to pay as they become due, all just claims" must be rejected as meaningless, if the promise to pay becomes effective only after the giving of the notice, since the point of time when a claim becomes due and the point of time of the giving of the notice cannot always be the same. If the promise to pay "as they become due" must stand, then the ninety days' notice must necessarily be regarded as a mere condition to the enforcement of the promise, and in no sense a condition of its obligation to pay the claims "as they become due."

The claim that the ninety days' notice is a condition of the obligation, can be based only upon the assumption that the obligation of a contract and the *judicial* remedy for its enforcement are inseparable; or in other words, that the *legal* obligation of a contract consists solely in the right to judicially enforce it. It is true that many cases in this Court arose upon state legislation, which acted upon the remedy so as to impair the legal obligation of the contract, and in endeavoring to show the importance of the remedy to the obligation, expressions have been employed (and quoted in counsel's brief) which severed from the connec-

tion in which they were used, may be understood as indicating that without a judicial remedy there can be no legal obligation. As applied to majority of contracts, such expressions are correct, for, as a general rule, wherever the law recognizes an obligation, it gives a judicial remedy to enforce it, but these expressions, when read with their context and in view of the subject-matter then in hand, cannot be understood as denying the distinction between the obligation and the remedy so clearly first recognized in the great cases of Sturges vs. Crowenshield 4 Wheat. 122 and Ogden vs. Saunders 12 Wheat. 213, and ever since adhered to by this Court.

Mr. Story, in his work on the Constitution, thus clearly defines the obligation of a contract: (Sec. 1385). "The obligation to perform a contract is coeval with the undertaking to perform it. It originates with the contract itself, and operates anterior to the time of performance. The remedy operates upon the broken contract and enforces, a pre-existing obligation."

And again in Sec. 1381: "There may exist a perfect obligation in contracts, where there is no known and adequate means to enforce them."

The proposition that the legal obligation to do a thing which the party has agreed to do, does not

exist without judicial remedy, makes the obligation to do it depend on the right and power of the Court to compel him; whereas the right and power of the Court to compel the act logically depend on a pre-existing obligation of the party to do it.

While it is true therefore, that in a certain sense, the laws which exist at the time of the making of a contract, relating to its enforcement, enter into and form a part of such contract, it does not follow that the law of enforcement of a contract is necessarily a part of its obligation, since the obligation of a contract is not something shifting, existing at one time and absent at another, but is *coeval* with the undertaking to perform it, and continues until it is fully performed, while the remedy operates merely upon the broken contract and enforces a pre-existing obligation.

State vs. Young, 29 Minn. 474-527 to 532.

As late as in *Berheiner vs. Converse* 206 U. S. 516, wherein was involved the double liability of stockholder under Minnesota law, this distinction was clearly pointed out by the Court. Impairment of obligation of contract was there claimed by a

stockholder, because under the old law, under peculiar practice, his liability could not be enforced, he being a non-resident of the State, while under the new law, the Legislature made the remedy more effectual, by dispensing with the requirement of service of process on the stockholder in the action for the assessment on his stock, and by authorizing the Receiver to sue the stockholder on the assessment anywhere he could be found; the change in the mode of enforcement of the liability was much more radical than in the case at bar. It was there claimed, as here, that the mode of enforcement of his liability was statutory, and was a part and parcel of his obligation; that the stockholder did not agree to become liable except as he could be made liable by the then existing statute, and that to make him liable by a new and more effectual remedy, was to increase his liability and impair his obligation. The Court, however, at all times, remembering the distinction between the obligation and the remedy, thus disposed of the contention:

> "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effecutal? The obligation of this contract binds the stock-

holder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to the amount equal to the stock held by each stockholder. That is his contract and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to creditor, and any attempt to increase the obligation beyond that incurred by the stockholder, would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the Legislature from giving additional remedy to make the obligation of stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more effecient remedy to enforce a contract already made."

The correct construction of the contract, between the parties, the analysis of the respective rights of parties to it, substantive and remedial, or in other words, the ascertainment of what is the obligation of the contract under consideration, is, as the Court will see, of the first importance for the solution of the question.

When the true obligation of the contract is once ascertained, the case is relieved of any legal

complications and it only remains to apply to it, the well settled rules. The most that the Surety can claim here, is an impairment of a remedial right, which in reality is in the nature of a technical defence to an action to enforce the contract. But it is settled that any defence resting upon inability to enforce a contract as made, may be taken away by the legislature.

15 *Am. and Eng. Enc. Law* 1053 Note 3.

So a defence of usury can be taken away.

Ewell vs. Doggs, 108 U. S. 151.
Gross vs. U. S. Mtge. Co. 108 U. S. 488.

There is no vested right in a defence based on informalities not affecting substantive equities.

Danforth vs. Groton 178 Mass. 472-477.
Farnsworth L. & R. Co. vs. Commonwealth T. Ins. & T. Co. 84 Minn. 62.
Foster vs. Bank 16 Mass. 245.
Campbell vs. Holt 115 U. S. 620.
Cooley Constitutional Limitations P. 378.

There is no vested right in any particular remedy. It is well settled that legislature may prescribe new remedies to enforce rights under

contracts, or may alter the form of administering right or justice.

Straw vs. Kilbourne 80 Minn. 125-137.
Henley vs. Myers, 76 Kans. 736.
(Affirmed in 215 U. S. 373-385.)
Doehla vs. Phillips 91 Pac. 330 (Cal.)
Bernheimer vs. Converse 206 U. S. 516.
8 *Cyc.* 910-918.

One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation designed only to enforce the performance of his obligation.

New Orleans vs. New Orleans 157 U. S. 219-224.

Conditions precedent to an action to enforce a contract or other right may be modified, enlarged, limited, or taken away.

8 *Cyc.* 911-917-918.
Oshkosh vs. Oshkosh 187 U. S. 437.

The repeal of a law regulating the manner in which notice of protest of promissory notes shall be given, does not impair the obligation of a contract.

Levering vs. Washington 3 Minn. 323. (Gil. 227).

Even where a contract expressly provides for a particular remedy, the abolishment of it by legislation, does not impair its obligation.

Conkey vs. Hart 14 N. Y. 22.
Worsham vs. Stevens 66 Tex. 89.

So the enforcement of a mechanic's lien is probably more nearly analogous to the enforcement of the bond in this case, said bond being a substitute for mechanic's liens. It is everywhere held that while the rights of the parties under mechanic's lien laws are to be ascertained and fixed by the law in force when the contract was made, yet such rights are to be established and enforced by the law existing at the bringing of the suit.

Philips Mechanics Liens Sec. 24 (3rd Edition)
Bardwell vs. Mann. 46 Minn., 285.

The constitutional prohibition can only be invoked for the protection of contractual obligations and not for the purpose of avoiding them. The position of the Surety in this case, is that of a debtor, and what it really seeks, is to avoid its obligation, merely because the change in the remedy affords better facilities for compelling it to perform its engagement. This cannot be done. As was well said by the Kansas Court in *Henley vs. Myers,*

76 Kans, 736 (on re-argument): "The constitutional prohibition against legislation impairing obligation of contracts, protects the creditor from change of procedure that makes his remedy substantially less effective but does not protect a debtor against a change that merely affords better facilities for compelling him to perform his engagement." This case was affirmed in *Kinley vs. Myers* 215 U. S. 373-385).

We have not taken space to review the cases cited in plaintiff's in error brief for the obvious reason that in all of them, the offending law was held to so affect some substantive right of the complaining party as to in fact impair the obligation of the contract. They are mostly cases affecting the rights of creditors, where the change of remedy amounted to a denial of some substantive right under the contract. This is not such case.

The judgment of the Supreme Court of Minnesota should be affirmed.

ARCADIUS L. AGATIN,
For Defendant in Error.

NATIONAL SURETY COMPANY *v.* ARCHITECTURAL DECORATING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 425. Submitted October 28, 1912.—Decided December 2, 1912.

While, in a general sense, the laws in force at the time the contract is made enter into its obligation, the parties have no vested rights in the particular remedies or modes of procedure then existing. *Water Works Co.* v. *Oshkosh*, 187 U. S. 437.

There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. *Bernheimer* v. *Converse*, 206 U. S. 516.

Where, as the state court has held in this case, the requirement that a preliminary notice that a third party intends to avail of the benefit of a bond given for performance of a contract is a condition precedent to an action on the bond, legislation altering the period within which such notice must be given affects the remedy and not the contract itself and does not amount to an impairment of the obligation of the bond within the contract clause of the Federal Constitution.

Chapter 413 of the General Laws of Minnesota of 1909, extending the time within which third parties intending to avail of the benefit of a bond given for completion of public buildings must serve notice of intention so to do, effected merely a change in remedy without substantial modification of the obligation of the contract and is not an unconstitutional impairment thereof.

115 Minnesota, 382, affirmed.

THE facts, which involve the constitutionality of a statute of Minnesota relating to enforcement of claims under building bonds, are stated in the opinion.

Mr. Jed L. Washburn, *Mr. W. D. Bailey* and *Mr. Oscar Mitchell* for plaintiff in error:

By the common law as interpreted by the Minnesota Supreme Court at the time the bond in question was given, no action could have been maintained by the Decorating Company against plaintiff in error on the bond sued on.

The right of action given is statutory in its origin, and was conditioned on giving the proper notice. *Park Brothers & Company* v. *Sykes*, 67 Minnesota, 153; *Eidsvik* v. *Foley*, 99 Minnesota, 468; *Breen* v. *Kelly*, 45 Minnesota, 352.

The statutes in force at the time the bond was executed and delivered, in so far at least as they conditioned the surety's liability, became a part of plaintiff in error's contract, including the requirement for notice therein, as fully in all respects as if such requirement for notice had been set out at length therein. *Grant* v. *Berrisford*, 94 Minnesota, 45; *United States* v. *Quincy*, 4 Wall. 535; *Walker* v. *Whitehead*, 16 Wall. 314; *Edwards* v. *Kearzey*, 96 U. S. 595; *McCracken* v. *Hayward*, 2 How. 608; *Barnitz* v. *Beverly*, 163 U. S. 118; *Bradley* v. *Lightcap*, 195 U. S. 1; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385.

The requirement fc notice in the statute at the time the bond was executed and delivered became a part of the contract thereafter existing between the plaintiff in error and the Decorating Company, and was a condition precedent to liability and no part of the remedy. *Grant* v. *Berrisford*, 94 Minnesota, 45; *The Harrisburg*, 119 U. S. 199; *Selma R. & D. R. Co.* v. *Lacey*, 49 Georgia, 106; *Hamilton* v. *Hannibal & St. J. R. Co.*, 39 Kansas, 56; *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Lambert* v. *Ensign Co.*, 42 W. Va. 813; *Theroux* v. *N. P. Ry. Co.*, 64 Fed. Rep. 84; *Babcock* v. *N. P. Ry. Co.*, 154 U. S. 190; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120; *Simerson* v. *St. Louis & S. F. R. Co.*, 173 Fed. Rep. 612; *Pohlman* v. *Railway Co.*, 182 Fed. Rep. 492; *Lange* v. *Railway Co.*, 126 Fed. Rep. 338; *Veginan* v. *Morse*, 160 Massachusetts, 143; *Healey* v. *Geo. F. Blake Mfg. Co.*, 180 Massachusetts, 270; *McRae* v. *Railway Co.*, 199 Massachusetts, 418; *Dolenty* v. *Broadwater* (Montana), 122 Pac. Rep. 191; *Hudson* v. *Bishop*, 32 Fed. Rep. 519; *S. C.*, 35 Fed. Rep. 820; *United States* v. *Winkler*, 162 Fed. Rep. 397; *United States* v.

Boomer, 183 Fed. Rep. 726; *Railway Co.* v. *Hine*, 25 Oh. St. 629; *Denver & Rio Grande* v. *Wagner*, 167 Fed. Rep. 75; *Christie-Street Commission Co.* v. *United States*, 126 Fed. Rep. 991, 996.

The requirement for notice being a condition precedent to the right of action, and no part of the remedy, could not be dispensed with by any act of the legislature, and chap. 413 of the Laws of 1909 dispensing with this notice, if applied to the bond in question, was unconstitutional as impairing the obligation of plaintiff in error's contract. *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Freel*, 186 U. S. 309; *Governor* v. *Lagow*, 43 Illinois, 141; *People* v. *Tompkins*, 74 Illinois, 487; *Grocer's Bank* v. *Kingman*, 16 Gray, 476; *Schuster* v. *Weiss*, 114 Missouri, 171; *King County* v. *Ferry*, 5 Washington, 554; *Green* v. *Biddle*, 8 Wheat. 1, 84; *Bank* v. *Sharp*, 6 How. 326; *Golden* v. *Prince*, 10 Fed. Cases, No. 544; *Louisiana* v. *New Orleans*, 102 U. S. 203.

Mr. Arcadius L. Agatin for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This is an action to recover damages for the breach of a bond made by the plaintiff in error as surety together with one Henricksen as principal, given to a certain school district of the State of Minnesota, conditioned that Henricksen should pay all just claims for work, materials, etc., furnished for the completion of a school building, for the construction of which he had made a contract with the district; the bond being given, according to its own recitals, for the use of the school district and of all persons doing work or furnishing materials under the contract. The contract and bond were made in the year 1908. The bond was executed and delivered pursuant to the provisions of the Minnesota statutes found in Rev. Laws

Minn. 1905, §§ 4535 to 4539, inclusive, which in effect require every public corporation of the State, on entering into a contract for the doing of any public work, to take a bond for its own use and for the use of all persons furnishing labor or material under or for the purpose of the contract, and which entitle any person so furnishing labor or material to maintain an action upon the bond, under certain conditions.

The defendant in error, during the months of July and August, 1909, performed certain services and furnished certain materials to Henricksen for use in carrying out his contract, for which a sum exceeding one thousand dollars remained due and unpaid, and to recover the amount so due this action was brought.

By § 4539, above referred to, which was in force at the time the contract for building the school was made and the bond given, it was enacted that—"No action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909, this section was amended by chapter 413, G. L. 1909, p. 501, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper public authorities," instead of within ninety days "after performing the last item of work or furnishing the last item of skill, tools, machinery, or material," and further amended by requiring the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues."

It will be observed that this change in the law went

into effect before the defendant in error performed the services and furnished the materials upon which the present action is based.

Defendant in error did not give notice to plaintiff in error in time to comply with § 4539, R. L. 1905, but did give such notice in time to comply with the amended act, if that be the applicable law.

The Supreme Court of the State of Minnesota in the present case held that the act of 1909 controlled, although passed after the bond in question was given, overruling the contention of plaintiff in error that the statute as so construed impairs the obligation of the contract contained in the bond, and is therefore contrary to § 10 of Art. I of the Federal Constitution. 115 Minnesota, 382.

The only question that need be here considered is whether the act of 1909, as thus construed, does impair the obligation of the contract.

Sections 4535–4539, R. L. 1905, originated in chap. 354 of the General Laws of 1895 and chap. 307 of the General Laws of 1897. Prior to this legislation the Supreme Court of Minnesota had held in *Breen v. Kelly* (1891), 45 Minnesota, 352, that although a municipal corporation, having authority to cause certain public work to be done and to make contracts for the doing of it, probably had implied authority to take security for its own protection, it had no authority to take security for third persons nor capacity to act as trustee in a contract made for their benefit, without express legislative authority; and that such a bond, although voluntarily given, was void. The same principle was adhered to in *Park Bros.* v. *Sykes* (1897), 67 Minnesota, 153.

By chap. 354 of the Laws of 1895, which first created the statutory right of action in favor of third persons upon such a bond, no notice by the third person to the principal or sureties was required as a condition precedent to his right to sue. He was merely obliged to bring his

action within one year after the cause of action accrued. Notice by the plaintiff to the principal and sureties was first required by chap. 307 of the Laws of 1897, the third section of which contained the same provisions that were afterwards embodied in the Revision of 1905, as § 4539, above quoted.

The Supreme Court of Minnesota, in the year 1904, in *Grant* v. *Berrisford*, 94 Minnesota, 45, 49, construed G. L. 1897, chap. 307, § 3, as follows: "The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues. Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond."

The argument for plaintiff in error is to the effect that since the right of action by a third party upon such a bond is of statutory origin, and since the statute in force at the time the bond in suit was given required a preliminary notice given to the obligors within a certain time, which notice (under *Grant* v. *Berrisford*) constituted a condition precedent to the action as much as if it had been set out as a proviso in the bond, a subsequent act of legislation dispensing with such notice, or changing the time within which it was required to be given, impairs the validity of the contract within the meaning of § 10 of Art. I of the Constitution.

The argument rests at bottom upon the proposition that because it required legislation to render such a bond actionable in behalf of third parties, the obligation of the bond as a contract is of statutory origin. But this

is not entirely clear. Treating the bond as voluntarily made, and aside from the statute, it is, in its essence, a contract between the obligors (including the Surety Company), on the one hand, and "all persons doing work or furnishing materials" for the construction of the school building (including the Decorating Company as one of those persons), on the other hand. The circumstance that the obligee in the bond as written was a public corporation named as trustee for the workmen and materialmen affects the form and not the substance of the obligation. The decision in *Breen* v. *Kelly*, denying the third party's right of action and holding such a bond void as to him, was not based upon any illegality or want of consideration in the contract, nor upon any incapacity of the obligors to make it; nor, indeed, upon any incapacity on the part of the real obligees to accept and rely upon such an undertaking. It proceeded wholly upon the ground of the legal incapacity of the municipal corporation to act as trustee for the persons beneficially interested.

But where parties have, in good faith and for a valuable consideration, entered into an engagement that is not contrary to good morals, and is invalid only because of some legal impediment, such as the incapacity of a nominal party or the omission of some merely formal requirement, there is ground for maintaining that the legislature may by subsequent enactment provide a legal remedy, and thus give vitality to the obligation that the parties intended to create. Cooley's Const. Lim., *293, *374; Sutherland on U. S. Const. 428, 429; *Ewell* v. *Daggs*, 108 U. S. 143, 151; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 488.

Nevertheless, granting, for the sake of the argument, the contention of the plaintiff in error that the contract in suit, so far as pertains to its obligation, is of statutory origin, it by no means follows that the provision respecting a preliminary notice to the obligors, as a condition

precedent to suit thereon, although contained in the law as it stood at the time the bond was given, cannot be constitutionally modified by subsequent legislation. The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges or modifies the obligation of a contract, and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself.

As Chief Justice Marshall observed in *Ogden* v. *Saunders*, 12 Wheat. 213, 349, the obligation and the remedy originate at different times. "The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a preëxisting obligation."

The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract." *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 439; citing many previous cases.

In *Bernheimer* v. *Converse*, 206 U. S. 516, this court held that a statute of Minnesota, enacted for the purpose of giving a more efficient remedy to enforce the contractual liability of stockholders to creditors, by enabling a receiver to maintain an action for the benefit of creditors outside of the jurisdiction of the court appointing him,—a remedy that by the laws of Minnesota was not available at the time the stock liability in question arose,—did not impair the obligation of the contract. Mr. Justice Day, speaking for the court, said, (at p. 530): "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made."

Again, in *Henley* v. *Myers*, 215 U. S. 373, where defendants became stockholders in a Kansas corporation at a time when by the laws of that State the stockholders of an insolvent corporation were liable to pay for the

benefit of creditors an amount equal to the par value of their stock, and the stock of the corporation was transferable only on the books of the corporation in such manner as the law prescribed; and afterwards, and before defendants sold their stock, the previous statute was amended so as to require the officers of a corporation, as soon as any transfer of stock was made upon its books, to at once file a statement thereof with the Secretary of State, and so that no transfer of stock should be legal or binding until such statement was made; and defendants, before insolvency of the corporation, transferred their stock upon the books of the corporation, but did not procure a statement of the transfer to be filed with the Secretary of State, and were therefore held liable in the state court to an action in favor of the receiver for the benefit of creditors; this court held that the act requiring stock transfers to be noted upon the public records, and providing that no transfer of stock should otherwise be legal or binding, did not impair the obligation of the contract under which the defendants acquired their stock.

In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond, affects the remedy and not the substantive agreement of the parties. And although the statute as it stood when the bond was given (R. L. 1905, § 4539) must, under *Grant* v. *Berrisford*, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute (G. L. 1909, chap. 413), effected merely a change in the remedy, without substantial modification of the obligation of the contract.

Judgment affirmed.